



North-South Irish Responses to Transnational Organised Crime: Research Report of Findings

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AHRC Research Project

NORTH–SOUTH IRISH RESPONSES TO TRANSNATIONAL ORGANISED CRIME

Research Report of Findings

Professor Tom Obokata, Principal Investigator

Dr Brian Payne, Research Fellow

Professor John Jackson, Consultant



Arts & Humanities
Research Council



Keele
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Table of Contents

Introduction	1
Executive Summary and Key Recommendations	3
Section 1: Understanding Organised Crime.....	11
1.1 The Nature and Extent of Organised Crime	11
1.2 International/Regional Legal Definitions.....	13
1.3 National Definitions	14
Section 2: Legislative Frameworks on Substantive Offences	19
2.1 Human Trafficking	19
2.1.1 International/Regional Standards.....	19
2.1.2 National Legislation	19
2.2 Drug Offences	20
2.2.1 International/Regional Standards.....	20
2.2.2 National Legislation	21
2.3 Fiscal/Excise Fraud	23
2.3.1 International/Regional Standards.....	23
2.3.2 National Legislation	24
Section 3: Investigation and Prosecution of Organised Crime	27
3.1 Key Law Enforcement Agencies	27
3.2 Special Investigative Techniques to Address Organised Crime.....	30
3.2.1 International/Regional Standards.....	30
3.2.2 National Legislation	31
3.2.3 Practical Aspects of Investigation.....	35
3.3 Prosecution	41
3.4 Cross-Border Co-operation	44
3.4.1 International/Regional Standards.....	44
3.4.2 National Legislation	46
3.4.3 Practical Aspects of Cross-Border Co-operation	48
3.4.4 The Role of European Union Agencies in Cross-Border Co-operation	51
3.4.4.1 Eurojust	51
3.4.4.2 Europol	53
Section 4: Criminal Proceedings and Confiscation of Criminal Proceeds	55
4.1 Trial Without Jury.....	55
4.2 Evidential Issues.....	58
4.3 Sentencing	61
4.4 Confiscation of Criminal Proceeds.....	65
Section 5: Prevention of Organised Crime	71
Section 6: Measuring the Effectiveness of Responses to Organised Crime	75
Conclusion	77

Introduction

This project was funded by the Arts & Humanities Research Council (AHRC) for the duration of two years (2012–2014). Its main objective was to critically analyse the extent to which Northern Ireland and Ireland have been successful in implementing effective action against transnational organised crime, including the observance of relevant human rights norms and principles, with particular reference to cross-border co-operation. The core research team consisted of Professor Tom Obokata (Principal Investigator), Dr Brian Payne (Research Fellow), and Professor John Jackson (Consultant). The project was overseen by an advisory board of stakeholders from both jurisdictions, representing agencies such as the Police Service of Northern Ireland, An Garda Síochána, the Department of Justice Northern Ireland, the Department of Justice and Equality in Ireland, the Organised Crime Task Force in Northern Ireland, HM Revenue & Customs, the Committee on the Administration of Justice, and the Irish Council for Civil Liberties. They provided advice on the direction of the project and identified relevant stakeholders for in-depth interviews. The research team would like to express its immense gratitude to the members of the advisory board for their support and guidance throughout the research cycle.

Before the initiation of the project, the following research questions were identified:

- How is organised crime defined in Northern Ireland and Ireland? Do the definitions adopted by both jurisdictions reflect the regional or international standards? If not, why not?
- What are the key law enforcement strategies and measures being adopted in these two jurisdictions, including those relating to protection and promotion of human rights?
- What provision is there to facilitate cross-border co-operation?
- What are the factors affecting the effective prevention and suppression of organised crime? Are these factors common to both jurisdictions or particular to one?
- What challenges are posed to the protection of the human rights of those suspected of organised crime and its victims as well as the general public?
- Is there a strong link between organised crime and terrorism, particularly in Northern Ireland? Are the law enforcement responses adequate to address this nexus?
- In light of the devolution of powers relating to criminal justice and policing in Northern Ireland, what are the key challenges facing authorities from both jurisdictions, particularly in relation to cross-border co-operation?
- How are the regional (EU law) and international (UN Convention) standards implemented in practice at the national level?

This final report provides answers to these research questions. In order to facilitate maximisation of impact, it also highlights numerous examples of good practice and recommendations for further consideration. Many issues discussed in this report also have wider implications beyond the island of Ireland, and it is hoped that relevant stakeholders and scholars in other jurisdictions find it useful.

In relation to research methodologies, the bulk of the research was based on a desktop analysis (literature survey) of relevant national, regional, and international legislation, reports published by governmental and non-governmental organisations, and national/international cases, as well as academic literature on the subject. This desktop work was significantly supplemented by a series of semi-structured interviews with key stakeholders. The research team was granted unprecedented access to key law enforcement agencies, civil society organisations, and the legal profession in both jurisdictions, allowing it to interview over 90 stakeholders. The research team is extremely grateful to everyone who kindly offered his/her time to be interviewed as well as to the advisory board for their assistance in identifying interviewees.

This report is divided into several sections. Section 1 starts with an analysis of the legal and non-legal definitions of organised crime adopted in Northern Ireland and Ireland. Section 2 examines the legislative frameworks relating to three forms of organised crime: human trafficking, drug offences, and fiscal/excise fraud. Section 3 continues with an analysis of law enforcement practice. The major focus was placed upon the use of special investigative techniques which facilitate intelligence-led law enforcement, including surveillance and interception of communications, and provisions for formal and informal cross-border co-operation. In Section 4, issues relating to criminal proceedings and confiscation of criminal proceeds—such as trial without jury, evidential matters, and civil recovery—are explored. Section 5 looks at prevention initiatives implemented by both jurisdictions. Finally, in Section 6, appropriate benchmarks to measure the effectiveness of action against organised crime are proposed.

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March 2014

Executive Summary

Understanding Organised Crime

There are two key international and regional instruments designed to facilitate effective action against organised crime: the United Nations Convention against Transnational Organised Crime 2000 ('the Organised Crime Convention') and the EU Council Framework Decision on the Fight against Organised Crime. Both instruments provide definitions of an 'organised criminal group'. These should be reflected at the national level to facilitate a concerted action against organised crime, but there is currently no legislation which contains a legal definition of 'organised crime' or 'organised criminal group' in the United Kingdom, including Northern Ireland. Instead, there is a preference for using working definitions adopted by law enforcement agencies such as the Serious and Organised Crime Agency (SOCA) (now the National Crime Agency (NCA)) and the Organised Crime Task Force of Northern Ireland (OCTF). These definitions do not resemble the ones provided by international and European instruments, raising a question as to whether the UK government pays attention to them. From the point of view of law enforcement on the ground, however, it was discovered that a lack of a legal definition has not caused any difficulty in Northern Ireland. This is because the nature and extent of organised crime would appear to dictate the types of response to be implemented, rather than any particular definitions. In Ireland, Part 7 of the Criminal Justice Act 2006, as revised by the Criminal Justice (Amendment) Act 2009, provides a legal definition of a 'criminal organisation'. It reflects the international and regional instruments, demonstrating that Ireland takes these more seriously. One point to note in relation to these definitions is that they are somewhat wide. In particular, generation of long-term benefit/profit, which is one of the key features of organised crime, is missing. This can create a risk of them being applied to a variety of crimes. In practice, it was discovered that the law enforcement communities have generally been able to distinguish organised crime from ordinary crime and apply the definitions appropriately. This has also been agreed by the judiciary in both jurisdictions.

Legislative Frameworks on Substantive Offences

The project focused on three core offences: human trafficking, drug offences, and fiscal/excise fraud such as fuel and tobacco smuggling. In relation to human trafficking, two key statutes in the United Kingdom are the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 which prohibit trafficking for both sexual and labour exploitation with a maximum penalty of 14 years' imprisonment. The Coroners and Justice Act 2009 further addresses slavery and forced labour with a similar punishment regime. The existence of different statutes means that the legislative framework is rather piecemeal in nature. In contrast, Ireland has enacted a specific statute to combat human trafficking. The Criminal Law (Human Trafficking) Act 2008 provides for penalties of up to life imprisonment and an unlimited fine. This is an example of good practice. One area which needs to be rectified is the lack of legislative frameworks on protection of victims. Although it is important to acknowledge that both jurisdictions do provide some forms of protection in line with international and European standards, the research team considers that a clear legal basis is desirable for clarity, consistency, and accountability. It is

important to mention here that both jurisdictions are dealing with this issue with a view to enacting legislation.

In relation to drug offences, the UK legislative framework seems appropriate both in terms of the definitions of offences and the penalties under the Misuse of Drugs Act 1971. Drug trafficking is taken just as seriously in Ireland, although various issues have been raised by stakeholders. These include the lack of a drug classification system and the application of presumptive sentencing of ten years for possession of drugs with an estimated street value of over €13,000 under the Misuse of Drugs Act 1977. Many stakeholders interviewed in Ireland are of the opinion that an amendment should be implemented. In addition, so-called 'legal highs' seem to be posing some law enforcement challenges, particularly in the United Kingdom/Northern Ireland where the legislative framework to deal with them is not as strong as in Ireland.

Finally, the prohibition and prosecution of fiscal/excise fraud in both jurisdictions are based on the system of customs and excise taxation on key commodities such as fuel, alcohol, and cigarettes. The Customs and Excise Management Act 1979 in the United Kingdom and the Finance Acts in Ireland seem to be sufficient to address these crimes. However, stakeholders felt that the punishment regimes (fines and custodial sentences) are not appropriately enforced.

Law Enforcement

A diverse range of law enforcement agencies have responsibility for tackling organised crime in both jurisdictions. Northern Ireland has taken a proactive multi-agency approach to addressing organised crime. Most notable in this regard is the creation of the OCTF in 2000. This brings together relevant law enforcement agencies, including the Police Service of Northern Ireland (PSNI) and HM Revenue & Customs (HMRC), other government departments, and local businesses. It was discovered that the OCTF has played, and continues to play, an important role in facilitating inter-agency co-operation. One remaining issue in this jurisdiction is the role of the newly created NCA. The research team learned that there is strong opposition on the part of certain political parties in Northern Ireland to such an Agency, particularly due to a lack of clear local accountability, and that its powers are currently limited. While there is a need for proper accountability, the research team considers that the current situation could lead to undesirable consequences, particularly in the area of asset recovery. In Ireland, law enforcement against organised crime is primarily the responsibility of An Garda Síochána's National Bureau of Criminal Investigation, which works in conjunction with other Garda Bureaus and Units. Revenue, Irish Tax and Customs is also important as it has responsibility in enforcing legislation relating to fiscal and excise fraud in Ireland. It was discovered that these agencies work reasonably well to address organised crime. Unlike Northern Ireland, however, Ireland does not have an arrangement akin to the OCTF. Given the benefit of such an arrangement, it might consider establishing a formal structure.

In relation to law enforcement practice, the project specifically looked at the use of special investigative techniques which are necessary to promote intelligence-led law enforcement. In the United Kingdom, the Regulation of Investigatory Powers Act 2000 provides for interception of communications, surveillance, and use of covert intelligence sources (CHIS). In Ireland, the use of

surveillance is regulated by the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 and the Criminal Justice (Surveillance) Act 2009. The latter is limited to surveillance with the use of devices and does not apply to other methods such as covert following. In addition, the use of CHIS in Ireland is not underpinned by legislation. In the main, the research team considers that the authorising procedures for these special investigative techniques are sufficiently stringent and these measures appear to be appropriately used by the law enforcement agencies. This was confirmed by judges in both jurisdictions. However, recommendations are made for greater judicial oversight to enhance clarity and public confidence in law enforcement.

A number of issues have been raised in relation to law enforcement. A difficulty in identifying criminal groups, particularly foreign ones, has been raised as an issue which needs to be tackled. The sophisticated nature of criminal groups and their operations is also making it harder for the law enforcement communities to investigate. Further, a culture of fear which exists in both jurisdictions sometimes prevents witnesses, victims, the business community, and the general public from co-operating with the law enforcement authorities. All of these would require the relevant authorities to continue their efforts to deploy community policing, investment in intelligence-led law enforcement, and proactive recruitment of officers from ethnic minority backgrounds. A lack of adequate human, financial, and other resources was another key problem experienced by all agencies. In addition to better allocation of resources, a more proactive use of criminal proceeds is recommended. While there is a scheme whereby Northern Ireland can utilise confiscated proceeds, the amount is not sufficient as only 50% of the proceeds confiscated through civil recovery are returned. Moreover, Ireland does not have a similar arrangement, although a point has been raised that it is more transparent to return all proceeds to the Exchequer. There is therefore scope for further consideration in both jurisdictions.

Protection of human rights in both jurisdictions was also examined. It is important to recognise from the outset that consideration and protection of human rights are part and parcel of law enforcement in both jurisdictions. The research team was informed that the agencies concerned carefully balance the rights of suspects and those of other stakeholders such as witnesses and victims and take an appropriate course of action generally. The lack of cases concerning abuse of power/process in both jurisdictions is one indication that the law enforcement communities have been able to exercise their investigative powers appropriately. This was also confirmed by judges interviewed. However, beyond actual law enforcement, some legislative changes are once again recommended to enhance human rights protection and public confidence.

In relation to prosecution of organised crime, one of the key issues raised is a lack of specific guidance for organised crime in both jurisdictions. Compared to England and Wales, the Public Prosecution Service (PPS) in Northern Ireland does not produce legal guidance regularly. However, the devolution of criminal justice and policing may require the PPS to create its own guidance in the future, particularly in the areas of fiscal/excise fraud and civil recovery. Also, the Office of the Director of Public Prosecutions (DPP) in Ireland does not see an acute need to publish legal guidance on organised crime. The research team takes the view that clearer guidance can enhance consistency and transparency in decision making and also educate the general public.

In terms of cross-border co-operation, all interviewees in the island of Ireland said that the state of affairs is generally positive. Formal co-operation in evidential and other matters is executed through measures such as the International Letters of Request and European Arrest Warrants. An Garda Síochána and the PSNI also regularly conduct parallel investigations for crimes which have cross-border dimensions. In addition, it was discovered through interviews that a more informal approach to cross-border co-operation is facilitated regularly at the frontline level. Law enforcement officers and prosecutors have their own contacts and can simply pick up a phone to ask questions and exchange information. They also have regular face-to-face meetings. These have helped them build mutual trust and working relationships. However, there is scope for improvement in certain areas. They include facilitation of joint investigation teams and cross-border surveillance as well as more proactive use of European agencies such as Eurojust. Creation of a joint multi-agency task force on organised crime might also be considered in order to strengthen the current efforts.

Criminal Proceedings and Confiscation of Criminal Proceeds

In both jurisdictions, there are certain arrangements under which a trial can be held without jury, and these include organised crime cases. In Northern Ireland, the Justice and Security (Northern Ireland) Act 2007 allows the DPP to issue a certificate that any trial on indictment be conducted without a jury where the offences involve ‘proscribed’ organisations and he is satisfied that there is a risk of administration of justice being impaired. In addition, there is a provision under section 44 of the Criminal Justice Act 2003 whereby an application may be made for a non-jury trial where there is a risk of jury tampering. In Ireland, the Special Criminal Court (SCC) has jurisdiction over ‘scheduled offences’ set out in the Offences Against the State (Scheduled Offences) Order 1972. The scope for ‘scheduled offences’ was extended by section 8 of the Criminal Justice (Amendment) Act 2009 so that offences involving ‘criminal organisations’ (eg participating in criminal organisations and committing offences for such organisations) will go to the SCC unless the DPP directs otherwise. Although stakeholders recognised the benefits of these arrangements, a greater degree of judicial scrutiny was recommended by the legal profession and civil society organisations. There is also scope to strengthen the offence relating to jury/witness intimidation in Northern Ireland so that it can tackle the culture of fear more effectively. In practice, it was discovered that these measures are rarely used for organised crime offences.

Certain evidential matters have also been raised. Disclosure of evidence is one of the fundamental principles in criminal proceedings, but this can be restricted to some extent under ‘public interest immunity’ or ‘public interest privilege’. These restrictions are necessary to protect the source of intelligence as well as the means and methods of intelligence gathering, and applications for these seem to be quite common in both jurisdictions. The operation of judicial oversight provides a safeguard against misuse, and generally a fair balance between the rights of defendants and the interest of justice appears to be struck. However, the use of opinion evidence in Ireland raises some concerns. The relevant legislation allows an opinion provided by a Garda officer in relation to the existence of a criminal organisation to be admissible. While the use of such evidence does not automatically result in a violation of one’s right to a fair trial provided that it is not the sole or decisive evidence, it is recommended that such opinions should only be provided by higher-ranking officers, similar to the legislation relating to terrorist organisations.

In relation to sentencing, the law enforcement communities in both jurisdictions argued that the penalties imposed are rather lenient. In response, judges regarded sentences to be appropriate as they have to take a variety of individual circumstances into consideration. While acknowledging the importance of judicial independence and discretion in sentencing, the need for consistency was highlighted by stakeholders. In this regard, the creation of sentencing guidelines on organised crime is recommended. In Northern Ireland, the Lord Chief Justice has initiated a Programme of Action, and guidelines on certain offences are currently being developed. In Ireland, the development of an arrangement similar to the Sentencing Council in England and Wales is currently being examined by the judiciary. These are important developments.

Finally, the project examined the confiscation of criminal proceeds of organised crime in both jurisdictions. Asset recovery in the United Kingdom, including Northern Ireland, is stipulated in the Proceeds of Crime Act 2002 which provides for two types of proceedings: 1) confiscation proceedings after a person is convicted of a criminal offence, and 2) civil recovery proceedings which do not require criminal conviction. Ireland also has similar arrangements under the Criminal Justice Act 1994 and the Proceeds of Crime Act 1996, as amended. It should be pointed out here that the Irish legislation is often used as a template for other States, including the United Kingdom, as it predates their legislation. In any event, some concerns were expressed in relation to civil recovery primarily because one does not have to be convicted of a crime and the civil standard of proof (ie balance of probabilities) is used. The law enforcement agencies regard civil recovery to be an appropriate measure for forfeiting criminal proceeds, and the Supreme Courts in both jurisdictions have upheld the regimes as being constitutional and/or human rights compliant. One interesting aspect of civil recovery in Northern Ireland is the role of the NCA. Previously its predecessor, SOCA, took a lead role by confiscating over 95% of criminal proceeds through civil recovery in this jurisdiction. The NCA cannot currently perform this function unless the crimes relate to reserved matters (eg immigration and customs offences). Given its established expertise and experience, the research team recommends that the NCA should be able to carry out this function for all forms of organised crime.

Prevention

The prevention of organised crime has become an important consideration in Northern Ireland and Ireland, with both jurisdictions implementing a variety of actions intended to raise public awareness, reduce demand for illicit goods and services, and restrict the opportunities for organised criminals to profit. In Northern Ireland, the ‘Changing the Mindset’ campaign, which aims to educate the general public about how their day-to-day activities can facilitate organised crime, is an example of good practice. In Ireland, relevant agencies, including the Department of Justice and Equality and An Garda Síochána, have also been intensifying their efforts in community outreach, particularly targeting young people who are at risk of committing crimes or purchasing illicit goods and services. However, the success of these measures can be called into question as the general public in both jurisdictions continue to purchase illicit goods and services provided by criminals. Although there are some examples of good practice in facilitating a multi-agency approach to prevention, all relevant government Departments, including Education, Health

and Social Development, should work closer together to devise a coherent and effective prevention strategy, as organised crime is not merely a criminal justice problem. They could also do more to reach out to the local/national media outlets, civil society groups, schools, and local communities experiencing social exclusion and poverty where there is an increased risk of people getting involved in criminal activities. Community policing is therefore important, and both jurisdictions should continue their good efforts in this regard.

Measuring the Effectiveness of Law Enforcement

Setting appropriate benchmarks and performance indicators is important in measuring the effectiveness of responses to organised crime. Both the law enforcement and political communities have traditionally relied upon criminal justice statistics such as the number of organised crime gangs dismantled and convicted, and the amount of drugs, cash, or illicit property confiscated. While these statistics are important in highlighting the nature and extent of organised crime, they do not necessarily provide accurate benchmarks to measure the effectiveness of law enforcement. Given the clandestine and sophisticated nature of organised crime, a large number of criminal activities are not detected in practice. The research team suggests that all stakeholders should also pay attention to other indicators such as poverty/economic hardship, social/cultural exclusion, education on organised crime provided to children and young adults, and rehabilitation and reintegration of offenders. Human rights compliance should also be considered.

Conclusion

It is clear that both jurisdictions have been making efforts to implement effective action against organised crime. There are numerous examples of good practice in law enforcement, including cross-border co-operation, and these should be clearly and widely acknowledged. Both jurisdictions also seem to take human rights seriously and strike a fair balance in protecting the rights of defendants as well as of other stakeholders such as victims and witnesses. However, it is also a fact that the general public continue to purchase illicit goods and services, and there are a number of issues which should be addressed so as to maximise the effort of the law enforcement communities in both jurisdictions. In the main, this requires the political community and the general public to understand that organised crime needs to be treated seriously and to have the confidence to give greater support to the law enforcement agencies so that they can carry out their functions effectively and efficiently. Appropriate punishments must also be imposed in order to send a clear message that organised crime is not acceptable. In addition, a strategy which also addresses the supply–demand dynamics of organised crime is needed. All of these require a truly multi-agency approach which sufficiently reflects the voices of the civil society sector as well as the general public.

Key Recommendations

Substantive Criminal Law

- The piecemeal nature of the human trafficking legislation in the United Kingdom (including Northern Ireland) should be rectified for clarity and consistency, and protection of victims should have a solid legislative footing in both jurisdictions.
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- The UK legislative framework needs to be strengthened in relation to so-called ‘legal highs’. In Ireland, the presumptive sentencing under the Misuse of Drugs Act 1977 should be repealed.
- There is scope to strengthen the punishment regimes for fiscal/excise fraud in both jurisdictions, and the relevant authorities might also examine a possibility of penalising the purchase of illegal fuel, cigarettes, and alcohol.

Criminal Investigation

- In order to strengthen a multi-agency approach to organised crime, including the development of a more comprehensive strategy, Ireland should consider establishing an arrangement similar to the OCTF in Northern Ireland.
- More rigorous judicial oversight of the use of special investigative techniques is desirable in both jurisdictions. In addition, comprehensive legislation which covers all aspects of these techniques should be enacted in Ireland.
- Both governments should continue their efforts in community policing to build a good rapport with the local communities, including ethnic minority groups.
- More adequate financial, human, and other resources should be allocated to the relevant agencies in both jurisdictions. In this regard, proactive use of confiscated criminal proceeds, as well as external funding, should be facilitated.
- Regular human rights training should be implemented for law enforcement agencies in both jurisdictions. A dedicated human rights legal adviser should also be appointed within An Garda Síochána in Ireland.

Prosecution

- Specific charging/prosecution guidelines on organised crime should be developed in both jurisdictions to maintain transparency and consistency in decision making.
- In Northern Ireland, prosecutors should be assigned to all cases involving organised crime from an early stage of investigation.
- It would be desirable if clear legislative provision were made in Ireland, as in the UK, for granting immunity from prosecution and other measures in order to secure assistance from offenders in criminal investigations.

Cross-Border Co-operation

- The Criminal Jurisdiction Act 1975 and the Criminal Law (Jurisdiction Act) 1976 should be amended to include organised crime offences, subject to greater harmonisation being achieved between the two jurisdictions in relation to suspects’ rights, such as the right to the presence of a lawyer during police interviews.
 - Ireland might consider opting in to some aspects of the Schengen Agreement, such as article 40 which allows cross-border surveillance. It should also make more proactive use of Joint Investigation Teams.
 - Both governments might consider establishing a joint multi-agency task force on organised crime to further promote mutual trust and closer co-operation.
 - The relevant EU agencies such as Eurojust should be utilised more proactively.
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Criminal Proceedings

- The Criminal Justice and Security (Northern Ireland) Act 2007 should be amended to strengthen judicial scrutiny over the DPP's decision as to the use of non-jury trial in connection with offences involving proscribed organisations.
- The punishment regime for jury tampering and witness intimidation should be strengthened in the United Kingdom, including Northern Ireland.
- In order to enhance public confidence, it is desirable that cases should only be sent to the SCC after consideration, on the merits of each case, whether or not the ordinary courts are adequate, and that there should be a mechanism for judicial scrutiny in respect of all cases that are sent to this court.
- The provision of opinion evidence under the Criminal Justice Act 2006, as amended by the Criminal Justice (Amendment) Act 2009, should be restricted to high-ranking Garda officers.
- More organised crime offences should be made referable for unduly lenient sentences in both jurisdictions.
- Clearer sentencing guidelines on organised crime should be developed in both jurisdictions.

Confiscation of Criminal Proceeds

- Northern Ireland should allow the High Court to be able to issue confiscation orders against assets held abroad, in line with developments in England and Wales under the Crime and Courts Act 2013.
- The NCA should be able to exercise civil recovery functions for all forms of organised crime in Northern Ireland. This is also desirable to maintain a multi-agency approach.
- In Ireland, the legislation on confiscation of criminal proceeds (Criminal Justice Act 1994), which allows for enhanced confiscation for drugs offences but not other types of organised crime, might be amended.

Prevention of Organised Crime

- Confiscated criminal proceeds should be effectively used for prevention of organised crime in both jurisdictions, particularly education and awareness raising among the general public, so as to address the demand side of illicit goods and services. More should be done to acquire co-operation of local/national media as well as the non-governmental sector.
- All relevant government departments, such as those dealing with education, social development, and health, should work together more closely to devise a comprehensive and coherent prevention strategy against organised crime in both jurisdictions.

Measuring Effectiveness of Action Against Organised Crime

- Instead of focusing too much on law enforcement statistics, the relevant agencies should also analyse the broader social contexts which fuel the demand for illicit goods and services. Other indicators such as poverty/economic hardship, social/cultural exclusion, education on organised crime provided to children and young adults, and rehabilitation and reintegration of offenders should be carefully considered. Human rights compliance should also be incorporated as this will help boost public confidence in law enforcement.
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Section 1: Understanding Organised Crime

1.1 The Nature and Extent of Organised Crime

Organised crime is an increasingly dynamic and complex phenomenon which poses a significant threat to the safety and prosperity of Northern Ireland and Ireland. In Northern Ireland, the latest OCTF threat assessment has identified a range of crimes prevalent in this jurisdiction, such as armed robbery and cash-in-transit attacks, tiger kidnapping, drugs offences, currency counterfeiting, excise and tax fraud, human trafficking, and money laundering.¹ These crimes are carried out by fluid, organised crime groups, both in terms of conventional criminals and current or former members of paramilitary organisations, with members changing depending on the skills needed for a particular enterprise. They are also good at adapting to the environment in which they operate by changing the types of crime they are involved in, developing new expertise, and exploiting perceived weaknesses and loopholes.² For example, the economic recession was said to have encouraged criminal groups to shift their focus to cigarette smuggling due to an increasing demand for cheap tobacco products in comparison to illegal drugs which generally cost more to purchase. Although the clandestine nature of organised crime makes it extremely difficult, if not impossible, to present an accurate picture, the available statistical information provides some indications about its scope. In 2012, the PSNI estimated that there were between 160 and 180 organised crime groups operating in Northern Ireland.³ In the same period, 116 of those were said to have been frustrated, disrupted, or dismantled.⁴ In addition, drug seizures increased by 14.2%, and cash seizures were also up by £379,132⁵ compared to the previous year.

In Ireland, organised crime also covers a wide range of activities, including drug trafficking, illegal trafficking of people, and fraud. It also includes other crimes such as high-tech crime, counterfeiting, serious armed robbery, organised vehicle crime, tiger kidnapping, and others.⁶ These are in line with the latest EU Serious Organised Crime Threat Assessment published by Europol which highlights in particular the prominence of drug trafficking, economic crime such as fraud, and the trafficking or smuggling of human beings.⁷ Annual figures released by An Garda Síochána show that its Organised Crime Unit was involved in 387 operations against organised crime groups in 2012. It also seized controlled drugs worth €4,591,200 in 2012, almost four times more than the previous year.⁸

It has been widely accepted by stakeholders that there is a strong cross-border element in the activities of organised crime gangs in the island of Ireland. The existence of a land border does not impede the operations of organised criminal networks, and in many cases it is used to their advantage. Officers from An Garda Síochána and Revenue, Irish Tax and Customs stated that

¹ OCTF, *Annual Report & Threat Assessment 2013* ('OCTF Annual Report 2013').

² *ibid.*

³ *ibid.*

⁴ PSNI, *End of Year Performance Report to Northern Ireland Policing Board 2012/13*, 14.

⁵ *ibid.*

⁶ Department of Justice and Equality, *What is Organised Crime* <http://www.justice.ie/en/JELR/Pages/Organised_crime> accessed 20 February 2014.

⁷ Europol, *Serious Organised Crime Threat Assessment 2013*, 6.

⁸ An Garda Síochána, *An Garda Síochána Annual Report 2012*, 3.

traditional cross-border offences such as cigarette smuggling and the laundering of diesel have increased in prominence recently. According to the Irish Tobacco Manufacturers' Advisory Committee, almost 20% of cigarettes consumed in Ireland in 2012 were illegally obtained, compared to less than 9% in 2007.⁹ Criminals involved in smuggling operations are said to be based mainly around the border on both sides, allowing them to co-ordinate efficiently. These crimes have also received considerable scrutiny in Northern Ireland in recent times, culminating in a special report of the Parliamentary Northern Ireland Affairs Committee.¹⁰ It is noteworthy that between 2012 and 2013, over 820,000 litres of illegal fuel with an estimated value of £480,000 were seized by HMRC.¹¹ Alarming, a recent survey on organised crime conducted in Northern Ireland reveals that only 20% of the respondents (1,154 in total) associated fiscal/excise fraud with organised crime.¹²

All interviewees representing different organisations have confirmed that there is a clear link between terrorism and organised crime in both jurisdictions.¹³ Paramilitaries are involved in organised crime either to finance their terrorist activities or simply to enrich themselves. On the one hand, Republicans are known to engage in extortion, money laundering through money service bureaus, and fuel/tobacco smuggling to finance their terrorist activities.¹⁴ On the other hand, Loyalists seem to be interested in maintaining an expensive lifestyle by, for example, getting involved in drug trafficking. The presence of paramilitary groups raises a number of problems for investigation as many operations have security risks, especially when utilising special investigative techniques such as surveillance, CHIS, and controlled delivery. Understanding these and others relevant issues is undoubtedly useful in identifying future trends and implementing appropriate action. In addition, a clear message that organised crime fuels terrorism in the island of Ireland must be effectively communicated to the general public to discourage them from purchasing illicit goods and services.

It was also highlighted by stakeholders that some tensions exist between various groups as they try to monopolise particular markets in order to maximise profits. This sometimes results in turf wars and violence, and the general public are often affected. This seems to have facilitated a 'culture of fear', which is particularly evident in Northern Ireland dating back from the time of the Troubles when paramilitary groups engaged in a variety of intimidation tactics. Given the strong nexus between organised crime and terrorism in the island of Ireland, it seems reasonable to argue that this culture of fear is still a serious problem. It should be highlighted in this regard that 68% of the respondents in the aforementioned survey believed that organised crime could lead to fear in the community.¹⁵ As will be shown below, this culture of fear has hampered the implementation of effective action against organised crime in both jurisdictions.

The picture is further complicated by the involvement of foreign criminal groups such as Chinese, East European, and West African gangs, although their presence is not as great as in other parts of Great Britain. A similar picture has emerged in Ireland. Chinese Criminal Groups have had a strong presence in cannabis cultivation in Northern Ireland, whereas the involvement of Vietnamese nationals has been recognised in Ireland.¹⁶ Many of the home-based criminals in both jurisdictions are said to have forged alliance with these and other criminals located in States

⁹ See ITMAC, *Tobacco Market* <<http://www.itmac.ie/media-centre/facts-figures/tobacco-market/>> accessed 28 February 2014. See also the Cigarettes Consumption Survey 2012 published by Revenue, Irish Tax and Customs, which found that 14% of all smokers were classified as having an illegal pack.

¹⁰ Northern Ireland Affairs Committee, First Special Report, Fuel Laundering and Smuggling in Northern Ireland, Third Report of Session (2012) ('Report on Fuel Laundering and Smuggling').

¹¹ OCTF Annual Report 2013, 12.

¹² Department of Justice, *Views on Organised Crime: Findings from the January 2013 Northern Ireland Omnibus Survey* (January 2013), 4 ('Omnibus Survey').

¹³ See also, Independent Monitoring Commission (2011), *Twenty-Sixth and Final Report of the Independent Monitoring Commission, 2004-2011: Changes, Impact and Lessons*, for a summary of paramilitary involvement in organised crime in Northern Ireland including cross-border crime.

¹⁴ PSNI and An Garda Síochána, *Cross-Border Organised Crime Assessment 2012*, 5 ('Cross-Border Organised Crime Assessment 2012').

¹⁵ Omnibus Survey, 4.

¹⁶ Cross-Border Organised Crime Assessment 2012, 8.

such as the Netherlands, Spain, Malaysia, and Cambodia to facilitate drug trafficking and tobacco smuggling.¹⁷ These foreign groups pose additional challenges due to cultural and language barriers, and this requires the law enforcement communities in both jurisdictions to adopt appropriate strategies.

1.2 International/Regional Legal Definitions

Perhaps the first step in facilitating an appropriate response is to have better understanding of what ‘organised crime’ really is. Adoption of legal or working definitions can be useful in this regard, and this has been happening at various levels of governance. At the international level, the Organised Crime Convention¹⁸ is the most important international instrument relating to organised crime. It does not provide a definition of organised crime. Instead, article 2 describes how ‘organised crime’ should be understood as a ‘serious crime’ committed by an ‘organised criminal group’:

‘Organised criminal group’ shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this convention, in order to obtain, directly or indirectly, a financial or other material benefit.¹⁹

The Convention defines ‘a structured group’ as a group that is not randomly formed for the immediate commission of an offence but does not need to have formally defined roles for its members, continuity of its membership, or a developed structure.²⁰ Moreover, a ‘serious crime’ shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least 4 years or a more serious penalty.²¹

A definition of organised crime is also set out in the EU Council Framework Decision on the Fight against Organised Crime.²² Article 1 defines a criminal organisation as:

A structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit.

The same article also defines a ‘structured association’ similarly to the Organised Crime Convention. When comparing the two instruments, it is apparent that they both define ‘criminal

¹⁷ *ibid* 5 and 22.

¹⁸ 2225 UNTS 209. The United Kingdom ratified this instrument in February 2006, and Ireland did the same in June 2010.

¹⁹ Art 2(a).

²⁰ Art 2(c).

²¹ Art 2(b).

²² [2008] OJ L 300/42.

offences’ as those being committed for financial or material benefit. Generally speaking, what distinguishes organised crime from ordinary crime is the generation of longer-term, as opposed to immediate, profit or benefit. This means that criminal proceeds are diversified and reinvested in legal/illegal enterprises for generation of sustained income. In this regard, organised criminal groups are comparable to legitimate corporations and businesses.

1.3 National Definitions

In United Kingdom, there is no legislation which provides a definition of organised crime. Instead, the law enforcement community uses the working definition adopted by SOCA:²³

The definition of organised crime is individuals, normally working with others, with the capacity and capability to commit serious crime on a continuing basis, which includes elements of planning, control and coordination, and benefits those involved.²⁴

In Northern Ireland, the OCTF has used the term ‘organised crime gang’ when providing a similar definition to the one provided by SOCA:

An organised crime gang consists of individuals, normally working with others, with the capacity and capability to commit serious crime on a continuing basis.²⁵

To begin with, this similarity suggests that a UK-wide approach, rather than a regional approach, is regarded as important in relation to organised crime to facilitate unified/consistent responses. Having different working definitions within all parts of the country could potentially undermine this. The OCTF goes further in defining a ‘serious crime’ as a crime which causes or has the potential to cause significant harm. In order to assist the interpretation of this, the OCTF makes reference to the Serious Crime Act 2007. Schedule 1 to this Act includes offences such as drug trafficking, people trafficking, arms trafficking, and child sex offences. In any event, both definitions are much broader than the one presented in the Organised Crime Convention as the phrase ‘normally working with others’ applies also to those organised criminals who work alone. Further, unlike the SOCA definition, the OCTF one does not contain the element of ‘benefits’, leaving a possibility of its application to a wide variety of offences.

When asked whether the UK definitions were fit for purpose, many interviewees stated that they were good working definitions, although some expressed a view that it might be difficult for the general public to understand them. This is an important point as misconceptions may affect

²³ On Monday 7 October 2013, SOCA was replaced by the NCA.

²⁴ Home Office, Local to Global: Reducing the Risk from Organised Crime: Home Office Organised Crime Strategy (2011), 8.

²⁵ OCTF, The Northern Ireland Organised Crime Strategy 2012-2014, 4.

effective prevention of organised crime and public confidence in law enforcement. In relation to the legal definitions under the Organised Crime Convention or the EU Framework Decision on Organised Crime, most of those interviewed in Northern Ireland said they were not aware of them. Judges in Belfast raised an important point that these definitions are not really relevant unless they are incorporated into domestic law. This firstly demonstrates that the relevant international and European standards are not necessarily communicated to, or understood by, the law enforcement community in Northern Ireland. Those who were aware of the definitions have not studied them in depth nor use them in their work. Secondly, as the UK definitions do not really reflect the ones provided by these instruments, it seems clear that the UK and Northern Irish governments do not take these standards seriously enough.

The benefit of having a legal definition is that it can provide clarity in law enforcement as all agencies will refer to it. In other words, it can facilitate common understanding. However, it has its downside. Certain criminal groups may not fit neatly into such a definition, and this may have repercussions in terms of their identification. This concern was expressed by many interviewees. Further, organised crime normally carries heavier penalties due to the fact that the involvement of sophisticated criminal groups makes their operations more successful and dangerous. Inability to identify a particular group under a legal definition, therefore, can have a negative impact on punishment.

In practice, it was discovered that a lack of definition has not caused any difficulty in Northern Ireland. The PSNI uses a mechanism known as CRIMNET which provides information on organised criminal groups. Consequently, it does not need to focus too much on the definitions. Its ability to address organised crime without a definition was also recognised by the UK National Member of Eurojust. Even then, the law enforcement community has not encountered any difficulty distinguishing organised crime from ordinary crimes. Judges also stated that it was not really necessary to have a definition of organised crime, as crimes are punished sufficiently under relevant legislation.

Another important aspect is international co-operation. It may be argued that different perceptions of organised crime can make it difficult to achieve this. However, our research has revealed that a lack of a legal definition in Northern Ireland has not undermined cross-border co-operation with Ireland. Stakeholders from both jurisdictions believed that variations were cosmetic and did not cause a problem for cross-border co-operation. The nature and extent of organised crime, rather than the definitions, would dictate the types of responses to be implemented. Once again, what is important to the frontline officers is to have a broader and shared understanding of organised crime/criminal groups.

Finally, when asked whether membership of mafia-type criminal organisations should also be criminalised, Justice McCloskey saw some advantages in this because of perceived changes to the nature of criminal activities in Northern Ireland. A similar opinion was expressed by the UK National Member of Eurojust and Detective Chief Superintendent Roy McComb, Head of the PSNI's Organised Crime Branch, highlighting that this can send a strong message to the general

public that it is not acceptable to be part of a criminal organisation. Criminalisation of membership has been implemented, for example, in the United States under the Racketeer Influenced and Corrupt Organizations Act (RICO), and this can be used to target those ranked high in its criminal organisations who may not directly commit organised crime. However, one defence lawyer in Northern Ireland stated that criminalisation of membership is potentially dangerous as it is difficult to clearly define what ‘a criminal group’ and ‘membership’ are in practice, with the result that the interpretation and application of the law could become unduly broad and uncertain.

Unlike Great Britain and Northern Ireland, there is a legal definition of ‘criminal organisation’ in Ireland. Under Part 7 of the Criminal Justice Act 2006, it is defined as:
a structured group, however organised, that—

- (a) is composed of 3 or more persons acting in concert,
- (b) is established over a period of time,
- (c) has as its main purpose or main activity the commission or facilitation of one or more serious offences in order to obtain, directly or indirectly, a financial or other material benefit.

Moreover ‘a structured group’ is a group which:

- (a) is not randomly formed for the immediate commission of a single offence, and
- (b) does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

Finally, a ‘serious offence’ is to carry a minimum of 4 years’ imprisonment. In explaining his decision to amend the 2006 Bill to include ‘Part 7 Organised Crime,’ the then Minister for Justice, Equality and Defence stated that the amendments were necessary in order to comply with the Organised Crime Convention.²⁶ Here, the willingness to abide by the international standards is clearly evident in Ireland.

The definition was subsequently amended by the Criminal Justice (Amendment) Act 2009:

‘criminal organisation’ means a structured group, however organised, that has as its main purpose or activity the commission or facilitation of a serious offence;

‘Structured group’ means a group of 3 or more persons, which is not randomly

²⁶ Select Committee on Justice, Equality, Defence and Women’s Rights Debate, ‘Criminal Justice Bill 2004’ (10 May 2006).

formed for the immediate commission of a single offence, and the involvement in which by 2 or more of those persons is with a view to their acting in concert; for the avoidance of doubt, a structured group may exist notwithstanding the absence of all or any of the following:

- (a) formal rules or formal membership, or any formal roles for those involved in the group;
- (b) any hierarchical or leadership structure;
- (c) continuity of involvement by persons in the group.

Most notable in the amended definition is the removal of a phrase ‘a financial or other material benefit’. This makes the Irish definition quite wide in scope, similar to the Northern Irish version, and enables the use of special powers and arrangements to be used for a wide variety of offences. In the Irish context, the Criminal Justice (Amendment) Act 2009 allows the following special measures to be taken:

- 1) The use of the Special Criminal Court.²⁷
- 3) Higher sentences for organised crime offences.²⁸
- 4) Ability of the court to draw inferences from failure to answer questions, failure to account for movements, actions or associations.²⁹
- 5) Admissibility of opinion evidence on the existence and operations of criminal gangs by Garda officers.³⁰

Interviews with officers from An Garda Síochána and prosecutors highlighted their familiarity with the legal definition of organised crime under the Irish legislation, with many of them confirming that they use it frequently while carrying out their roles. Although most of them were not familiar with the definitions set out in international and European instruments, those who did were aware that the Irish legal definition was quite similar. A representative from the Irish Council for Civil Liberties (ICCL) raised an important point that the definition could institutionalise a popular notion of organised crime and also be used to justify quite draconian crime control.³¹ A similar view was expressed by the Irish Human Rights Commission prior to the enactment of the 2009 Act.³² On this point, the law enforcement community in Ireland disagreed, stating that they were generally able to distinguish organised crime from ordinary crime and apply the definition appropriately. This was also confirmed by a High Court Judge in Ireland who noted that the law enforcement agencies have not abused the definition. There was a consensus, though, that the wider definition could indeed make it easier to prosecute those who are not directly involved in organised criminality but are involved in connected supporting activities such as transporting illicit goods or handling/launders money.

Another important issue raised by the Deputy Director of Public Prosecutions in Ireland is that it is often difficult to prove a connection between the existence of a criminal organisation, which

²⁷ s 8.

²⁸ ss 6 and 12.

²⁹ s 9.

³⁰ s 7.

³¹ See also ICCL, *Combating Organised Crime and Respecting the Rule of Law: Human Rights Based Alternatives to the Criminal Justice (Amendment) Bill 2009*, 10-11.

³² Irish Human Rights Commission, *Observations on the Criminal Justice (Amendment) Bill 2009*, 12.

can be established by the opinion evidence of a member of An Garda Síochána,³³ and the proof that the accused participated in the activities of the organisation in practice. For this reason, there is a preference to prosecute for substantive offences such as drug trafficking as this enhances the chance of successful prosecutions. A defence lawyer in Ireland also pointed out that there was never any immediate need for organised crime legislation as criminal gangs are mostly arrested for stand-alone crimes. All these points raise an important question as to whether it is actually necessary to create a specific offence of membership of a criminal group in Northern Ireland. In addition, the ICCL has cogently argued that, as the organised crime legislation is not relied upon regularly in Ireland, it should be repealed in order to enhance legal certainty in criminal law.

In conclusion, the definitions of organised crime do not seem to be overtly significant when it comes to actual law enforcement. All agencies have a shared understanding of what organised crime is and are able to distinguish it from ordinary crime. This has also been confirmed by judges in both jurisdictions.

³³ Criminal Justice Act 2006, s 71B, as inserted by Criminal Justice (Amendment) Act 2009, s 7.

Section 2: Legislative Frameworks on Substantive Offences³⁴

2.1 Human Trafficking

2.1.1 International/Regional Standards

Human Trafficking is considered an offence under international law, most notably by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children attached to the Organised Crime Convention.³⁵ This instrument is important as it introduced a three-pronged policy—‘3Ps obligations’—focusing on prosecution, protection, and prevention. Regionally, an important instrument is the Council of Europe Convention against Trafficking of Human Beings 2005,³⁶ which particularly enhances the protection aspect.³⁷ Another relevant trafficking instrument is the EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims (EU Trafficking Directive).³⁸ This Directive is an attempt to tighten up the EU’s action on trafficking and contains binding obligations relating to approximate legislation, penalties, and prevention, as well as enhanced assistance to victims.

2.1.2 National Legislation

With respect to national approaches to human trafficking, legislation relating to human trafficking is organised quite differently in the United Kingdom and Ireland. In the United Kingdom (including Northern Ireland), there is no single statute applicable to trafficking. Two key statutes are the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, which apply to trafficking for both sexual and labour exploitation with a maximum penalty of 14 years’ imprisonment. Another relevant instrument is the Coroners and Justice Act 2009, which prohibits slavery and forced labour in line with article 4 of the European Convention on Human Rights 1950 (ECHR).³⁹ In order to comply with the EU Trafficking Directive, particularly the prosecution of UK nationals who traffic people elsewhere in the world and internal trafficking, amendments have been made in England and Wales through the Protection of Freedoms Act 2012, and in Northern Ireland through the Criminal Justice Act (Northern Ireland) 2013. **One issue which needs to be addressed in relation to human trafficking legislation in the United Kingdom is its piecemeal nature. Instead of having several statutes covering this crime, it is desirable to have a single legislation for clarity and consistency. The research team welcomes the introduction of a Modern Slavery Bill before Parliament in December 2013, as it aims to consolidate the existing statutes on trafficking and slavery. It also proposes to increase the punishment to life imprisonment. A parallel development can be seen in Northern Ireland where the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill⁴⁰ is currently moving through the Northern Ireland Assembly as a**

³⁴ For the purpose of this report, the research team will concentrate on three important forms of organised crime highly relevant to both jurisdictions: human trafficking, drug offences, and fiscal/excise fraud such as cigarette smuggling and fuel laundering.

³⁵ 2237 UNTS 319.

³⁶ ETS No. 197.

³⁷ Art 1.

³⁸ [2011] OJ L 203/1.

³⁹ ETS No. 5.

⁴⁰ A private Member’s Bill by Lord Morrow.

part of the legislative process. It is important that the relationship between these Bills is clarified so as to prevent the implementation of fragmented responses to human trafficking. It should be noted in this regard that the Minister of Justice for Northern Ireland issued a consultation in January 2014.⁴¹

In contrast, Ireland already has enacted a specific statute to combat human trafficking. The Criminal Law (Human Trafficking) Act 2008 provides for the definition of trafficking in line with the Trafficking Protocol and the Council of Europe Convention and penalties of up to life imprisonment and an unlimited fine. It is therefore evident that the legislative framework is more advanced in Ireland than in the United Kingdom, and this is an example of good practice. However, it has been pointed out by the law enforcement community that the definition of trafficking is not always well understood by the general public. It was also highlighted that the definition of forced labour was inadequate. The latter issue has been remedied by the recent amendment to the 2008 Act which has added a definition of forced labour.⁴²

A major shortcoming in the current human trafficking legislation in Northern Ireland and Ireland is that it does not contain provisions on protection of victims of trafficking, although both governments provide certain protection including reflection periods, medical/psychological assistance, and subsistence outside of the legislative frameworks in accordance with the international and European standards.⁴³ A lack of legal basis can be problematic from the point of view of clarity and accountability, and the importance of having legislation on protection was stressed by the Group of Experts on Action against Trafficking in Human Beings (GRETA) established by the Council of Europe Convention.⁴⁴ While the Minister of Justice for Northern Ireland previously expressed his intention to bring forward secondary legislation to put protection on a legislative footing, this was suspended due to the introduction of Lord Morrow's Bill. However, it is encouraging to note that the Bill provide for a range of provisions for assistance and support in Parts 2 and 3. Ireland also has proposed legislation—the Immigration, Residence and Protection Bill—introducing rules on the identification of victims, reflection period(s), and residence permits. These are examples of good practice and should be followed through. However, the Modern Slavery Bill does not contain any provisions on protection.⁴⁵ **The research team recommends that the UK government seriously considers putting protection on a legislative footing.**

2.2 Drug Offences

2.2.1 International/Regional Standards

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988⁴⁶ is the primary international drug-control treaty currently in force. It includes a range of measures such as article 3 which obliges States to ban illegal possession, purchase, or cultivation. Various parts of the Convention are devoted to fighting organised crime by mandating co-operation in tracing and seizing drug-related assets. Under EU law, the chief instrument in combating drug offences is the Council Framework Decision Laying Down Minimum Provisions

⁴¹ The closing date for consultation is 15 April 2014.

⁴² Criminal Law (Human Trafficking) (Amendment) Act 2013.

⁴³ National Referral Mechanism in the UK, including Northern Ireland, and Administrative Immigration Arrangements for the Protection of Victim of Human Trafficking in Ireland.

⁴⁴ GRETA, *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking of Human Beings by United Kingdom* (September 2012), 87 and *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking of Human Beings by Ireland* (September 2013), 63.

⁴⁵ See also Immigrant Council of Ireland, *Comments on the Criminal Law (Human Trafficking) (Amendment) Bill 2013* for a discussion of the limitations of current arrangements for protecting victims of human trafficking in Ireland.

⁴⁶ 1582 UNTS 95.

on the Constituent Elements of Criminal Acts and Penalties in the Field of Illicit Drug Trafficking,⁴⁷ which, like the EU Trafficking Directive, encourages Member States to adopt a common EU approach through approximation of national criminal laws and procedures. In this regard, article 4 requires that drug offences are punishable by effective, proportionate, and dissuasive penalties and should include a maximum penalty of at least 10 years where the offence was committed within the framework of a criminal organisation.⁴⁸

2.2.2 National Legislation

On paper, the UK legislative framework for prosecuting drug offences seems sufficient both in terms of the definition of offences, the penalties they attract and the provisions for the recovery of assets gained from the illicit trade in drugs. The primary legislation is the Misuse of Drugs Act 1971, which defines a series of offences, including unlawful supply, intent to supply, import or export (all these are collectively known as 'trafficking' offences), unlawful production and possession. Each offence is rated against a classification system which is used to set an appropriate penalty. The maximum sentence for supplying, importing, or exporting Class A drugs is life imprisonment, and in relation to Classes B and C drugs, it is 14 years' imprisonment. The maximum sentence for possession is 7 years' imprisonment for Class A drugs, reduced to 5 years for Class B drugs and 2 years for Class C drugs. The Drug Trafficking Act 1994 is also an important piece of legislation for recovering the proceeds of drug trafficking offences. It allows for the seizure of assets and incomes of any person found guilty of drug trafficking, even if they do not come from the proceeds of this crime. Finally, the Drugs Act 2005 introduced a provision for the reversal of the burden of proof in cases where suspects are found in possession of a quantity of drugs greater than that which would be required for personal use. Together, the legislation for drug offences seems to be in conformity with the aforementioned 1988 UN Convention and the EU Framework Decision.

While the law on drug offences is the same in England, Wales, Scotland and Northern Ireland due to the fact that the misuse of drugs is a reserved matter, there are discrepancies in terms of sentencing. According to the research conducted by the Northern Ireland Assembly, more people were given immediate custodial sentences for drug offences in England and Wales than Northern Ireland, and the Northern Irish courts has imposed more suspended sentences than the English or Welsh courts.⁴⁹ These variations presumably come from different approaches to sentencing adopted in these jurisdictions. In England and Wales, the Sentencing Council recently published *Drug Offences: Definitive Guidelines* in 2012, which is utilised by English and Welsh judges to facilitate consistency in sentencing. The Northern Irish courts are not bound by this and often refer to so-called guideline cases in reaching decisions. In the recent case of *DPP's Reference (No 2) of 2013*,⁵⁰ for example, the Court of Appeal argued that some aspects in the Definitive Guidelines, such as setting starting points and ranges depending on the category of harm caused and the nature of the role of offenders, might prevent the judge from exercising his/her discretion in finding the right sentence. While the adoption of different approaches is an inevitable consequence of devolution, it can simultaneously increase the possibility of forum shopping whereby criminals concentrate their activities in jurisdictions where the punishment regimes are weaker. This is also relevant to other forms of organised crime and should be considered carefully by all stakeholders.

⁴⁷ [2004] OJ L335/8.

⁴⁸ Art 4(3).

⁴⁹ Northern Ireland Assembly, *Sentencing Comparisons in Northern Ireland and England and Wales* (April 2012), 21. It is important to note that the figures were obtained in 2006. However, a similar trend can be seen in the figures obtained in 2009. In that year, 14.2% of those convicted of drug offences received suspended sentences in Northern Ireland, whereas the figure is lower at 5.5% in England and Wales. See Ministry of Justice, *Sentencing Statistics: England & Wales 2009*, and Department of Justice, *Northern Ireland Conviction and Sentencing Statistics 2009*.

⁵⁰ [2013] NICA 28.

When asked about the effectiveness of the legislative framework for drug offences in Northern Ireland, including the levels of available penalties, all interviewees answered in the affirmative. However, many PSNI officers stated that the cross-border nature of the trade in drugs raised major difficulties for law enforcement. Organised criminals pay little attention to the border with Ireland as noted above, and most of the drugs that enter Northern Ireland tend to be passing through to larger markets in the UK. Consequently, the PSNI officers described the importance of having effective systems for cross-border co-operation in place, and these measures will be discussed in detail below.

In Ireland, the primary legislation is the Misuse of Drugs Act 1977. This has been subsequently amended by the Misuse of Drugs Act 1984, the Criminal Justice Act 1999, the Criminal Justice Act 2006, and the Criminal Justice Act 2007. The 1977 Act is supplemented by the Criminal Justice (Psychoactive Substances) Act 2010, which covers substances which are not specifically proscribed under the 1977 Act. These Acts define the penalties for unlawful production, possession, and supply of drugs. Unlike the United Kingdom, Ireland does not have a similar classification system, but instead bases the penalties on the values and quantities of the drugs. Generally, tariffs for possession of illegal drugs in Ireland appear to be similar to the United Kingdom, although in Ireland the courts have much more freedom in setting them. In terms of other offences, under section 15A of the 1977 Act, as amended, it is an offence to be in possession of controlled drugs with a market value of over €13,000 for sale or supply. The penalties for this offence have been amended by the Criminal Justice Act 1999 and the Criminal Justice Act 2007, and now any person found guilty can face up to life imprisonment and a fine. Further, where the market value of the drugs is €13,000 or more, a person faces a minimum sentence of 10 years, save in exceptional or special circumstances. Similar penalties apply to any person convicted of importing drugs with a value of €13,000 or more.⁵¹

Various issues have been raised by stakeholders in relation to the Irish legislative framework on drug offences. Garda officers, prosecutors, and defence lawyers all agreed that a classification system was desirable in Ireland for clarity and coherence. They pointed to the fact that a person found to be in possession of cannabis with a market value of €13,000 could attract the same custodial sentence as possession of €13,000 worth of heroin or cocaine. A question was also raised as to the reasonableness of applying presumptive sentencing of 10 years for possession of drugs with an estimated street value of over €13,000 for the reason that such a sentence disregards the need for individualisation of punishment (taking into account offenders' personal circumstances) and proportionality in sentencing.⁵² Defence lawyers and the ICCL additionally highlighted an undesirable consequence of overcrowded prisons because of the mandatory sentences. Some of these concerns are shared by the Law Reform Commission in its report on mandatory sentences, including those relating to drug offences, published in June 2013.⁵³ After a careful analysis of legislation, jurisprudence, other State practices, and scholarly publications, it made an observation that the presumptive sentencing was not effective as it did not serve as strong deterrence.⁵⁴ It also recognised that the market value of €13,000 was prioritised at the expense of other relevant factors such as 'the role, motive and the state of mind of offenders', resulting in inconsistent and disproportionate punishments and affecting the principle of justice.⁵⁵

⁵¹ Misuse of Drugs Act 1977, ss 15B and 27, as amended by Criminal Justice Act 2006, s 84.

⁵² Department of Justice and Equality, *White Paper on Crime, Third Discussion Document: Overview of Submissions Received* (April 2011), 39 ('Third Discussion Document').

⁵³ Law Reform Commission, *Mandatory Sentences* (June 2013).

⁵⁴ *ibid* 175.

⁵⁵ *ibid* 175-176, 178, 181.

Consequently, the Commission recommended that presumptive sentencing under the 1977 Act should be repealed.⁵⁶ **The research team regards this as a reasonable recommendation and supports reform in this regard.**

An interesting area that has developed in recent times is the status of so-called ‘legal highs’ in both jurisdictions. The recent OCTF Annual Report and Threat Assessment states that the emergence of legal highs and new psychoactive substances has posed challenges for law enforcement authorities.⁵⁷ These substances are often purchased from ‘head shops’ and internet sites. If the internet servers are located abroad, this makes criminal investigations more complicated. Also, when some of these substances are made illegal, suppliers are very quick to advertise their replacements. In addition, classification of ‘legal highs’ for the purpose of criminalisation is not straightforward given the amount of time it takes to carefully analyse their contents and effects. Interviews with law enforcement officers in Northern Ireland revealed that these have been causing significant difficulties in detecting and preventing the use of such substances. In the United Kingdom, the Misuse of Drugs Act 1971 also regulates legal highs. An important amendment was made through the Police Reform and Social Responsibility Act 2011, which allows the Home Secretary to issue temporary class drug orders for substances which are not appropriately classified previously, after consulting the Advisory Council on the Misuse of Drugs. The government then has up to 12 months to place these substances under permanent control under the 1971 Act.⁵⁸ Importation, exportation, production, and supply of substances placed under these orders will attract the maximum penalties of 14 years’ imprisonment and an unlimited fine on indictment.

In Ireland, the Criminal Justice (Psychoactive Substances) Act 2010 introduced a ban on the selling, advertising, and distributing psychoactive products. The legislation allows the law enforcement authorities to effectively close head shops who continue to sell such products. This may have important cross-border implications as people from Ireland can travel to similar shops in the Northern Ireland and purchase psychoactive products without fear of prosecution. **Similar legislation on closing head shops does not exist in the United Kingdom. Therefore, central government should consider adopting a similar approach to Ireland on this issue. It is worth mentioning here that the Home Office launched a review of ‘legal highs’ in December 2013,⁵⁹ and the research team welcomes this development.**

2.3 Fiscal/Excise Fraud

2.3.1 International/Regional Standards

As there is no international treaty relating to fiscal fraud, the United Kingdom and Ireland must look to the EU for guidance. The primary instrument relating to customs and excise arrangements is the Council Directive Concerning the General Arrangements for Excise Duty.⁶⁰ This instrument lays down general arrangements for excise duty to be levied on goods including energy products, alcohol and alcoholic beverages, and manufactured tobacco. It also sets out the requirement for Member States to incorporate a new computerised holding, movement, and duty point system

⁵⁶ See also Irish Penal Reform Trust, *Position Paper 3: Mandatory Sentencing* (August 2013).

⁵⁷ OCTF Annual Report 2013, 26.

⁵⁸ See ACMD, *Temporary Class Drug Order on Benzofury and NBOMe Compounds - Letter to the Home Secretary* (June 2013).

⁵⁹ Home Office, *Terms of Reference for a Review into Legislative Options to Tackle New Psychoactive Substances* (December 2013).

⁶⁰ [2008] OJ L 9/12 (2008).

as a replacement for the old paper-based means of recording customs and excise transactions.⁶¹ Subsequently, a recommendation to introduce an online system to capture and monitor the movement of excise goods was agreed by all Member States in June 2013.⁶² In relation to administrative co-operation among Member States, the Convention on Mutual Assistance and Co-operation between Customs Administrations (Naples II),⁶³ the Council Regulation on Administrative Co-operation and Combating Fraud in the Field of Value Added Tax⁶⁴ and the Council Directive on Administrative Co-operation in the Field of Taxation⁶⁵ are pertinent. In addition, the European Commission recently drafted the 'Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion' in 2012.⁶⁶ This highlights the current EU measures being taken and proposes recommendations for the future, including better information exchange, police co-operation, and enhanced tax compliance through legislative and other means.

2.3.2 National Legislation

The prohibition and prosecution of fiscal fraud in both jurisdictions is based on the system of customs and excise taxation on key commodities such as fuel, alcohol, and cigarettes. In the United Kingdom (including Northern Ireland), section 170 of the Customs and Excise Management Act 1979 criminalises fraudulent evasion of duty. The penalty for this offence on summary conviction is a fine which is three times the value of the goods, and/or imprisonment of 6 months. Upon conviction on indictment, a penalty of any amount and/or 7 years' imprisonment may be imposed. The 1979 Act also provides for offences of handling goods subjects to unpaid excise and taking preparatory steps for evasion of excise duty.⁶⁷ The Fraud Act 2006 supplements the 1979 Act by prohibiting a range of fraud offences with a maximum of 10 years' imprisonment. While the custodial sentences in the United Kingdom seem adequate, the regime of fines is not always effective, as the amount might not be very high if criminals are caught with small quantities of illegal goods. **The United Kingdom should consider setting higher fines.**

The legislation pertaining to fiscal/excise fraud in Ireland presents a similar range of prohibition. Section 102 of the Finance Act 1999, as amended criminalises the improper selling or supplying of mineral oil, with a fine of €5,000 or 12 months' imprisonment. These are increased to €126,970 or 5 years, respectively, upon indictment under the Finance Act 2010. Under section 79 of the Finance Act 2003 as amended, attempting to supply or sell alcohol without paying appropriate tax or producing or supplying illegally produced alcohol carries (on summary conviction) a fine of €5,000 or up to 12 months' imprisonment. On indictment, the penalties are increased to a fine not exceeding €126,970 or 5 years' imprisonment. Similar arrangements exist for tobacco fraud under section 78 of the Finance Act 2005 as amended. **While it should be recognised that the imposition of large fines in Ireland may have a stronger deterrent effect compared to the United Kingdom, a custodial sentence of 5 years maximum seems rather low. An important point was raised by the officers of Revenue, Irish Tax and Customs that the amount of illegal profit made from fiscal/excise fraud is similar to that of drug trafficking, and yet the punishment regimes are quite different. The research team therefore recommends that this part of the relevant legislation is reviewed.**

In looking at the legislative frameworks on substantive offences in both jurisdictions, it can be

⁶¹ See, for example, the HMRC's analysis of the new Excise and Customs Movement System <<http://www.hmrc.gov.uk/emcs/index.htm>> accessed 28 February 2014.

⁶² European Commission, *Functional Excise System Specifications*.

⁶³ [1998] OJ C 24/1.

⁶⁴ [2010] OJ L 268/1.

⁶⁵ [2011] OJ L 64/1.

⁶⁶ COM (2012) 722 final.

⁶⁷ ss 170A and 170B.

concluded that they are generally in conformity with the international and European standards in terms of the scope of relevant offences. At the frontline level, the law enforcement community and members of the legal profession are of the opinion that the current legislative frameworks are also adequate. However, it was felt that the punishment regimes should be strengthened. A related question is whether or not the governments in both jurisdictions should strengthen the legislative provisions to penalise the purchase of some illicit goods. This has long been established for drug offences. In relation to human trafficking, the United Kingdom has enacted legislation—the Policing and Crime Act 2009—that imposes a fine of up to £1,000 upon those who purchase sexual services from trafficked victims, and section 5 of the Criminal Law (Human Trafficking) Act 2008 in Ireland similarly prohibits the solicitation of trafficked victims for the purpose of prostitution with a maximum penalty of 5 years’ imprisonment.⁶⁸ However, provisions are lacking in relation to the purchase of illegal cigarettes, fuel, and alcohol, and a question may be asked whether some types of penalty should be imposed. *Retail against Smuggling*, established to tackle cigarette smuggling in Ireland, has suggested an on-the-spot fine before the Joint Committee on Finance, Public Expenditure.⁶⁹ An argument may be made to apply such a penalty to illegal fuel or alcohol. However, an important point has also been raised by HMRC as to whether the implementation of such penalties is an effective use of resources on the part of law enforcement agencies and the judiciary. The extent to which such a measure can discourage the general public from purchasing illegal goods is also not clear. Therefore, this issue of penalising the purchase of illicit goods and services deserves further discussion and careful consideration.

⁶⁸ The penalties resulting from summary conviction are imprisonment of up to 12 months and/or a fine of up to €5,000. See also ongoing debates on the legal status of prostitution generally in Department of Justice and Equality, *Discussion Document on Future Direction of Prostitution Legislation* (June 2012), and Joint Committee on Justice, Defence and Equality, *Report on Hearings and Submissions on the Review of Legislation on Prostitution* (June 2013).

⁶⁹ Joint Committee on Finance, Public Expenditure and Reform, *Correspondence 2012/354* (October 2012).

Section 3:

Investigation and Prosecution of Organised Crime

3.1 Key Law Enforcement Agencies

The principal section of the PSNI with responsibility for organised crime is the Organised Crime Branch which has a little over 100 officers. Previously there were various units dealing with organised crime, such as the drug squad, robbery squad, and economic crime bureau. They were merged into a single Organised Crime Branch in 2010 after a strategic decision was made that the PSNI should focus on the activities of organised crime rather than on illicit goods and services. One key benefit seems to be that officers are structured into omni-competent teams which are able to tackle the totality of organised crime, rather than having narrower focuses. This in effect reduces the need for training/retraining depending on the types of crimes they deal with, and many PSNI officers stated through interviews that the current structure worked well. In recent times the Organised Crime Branch has engaged in a number of notable initiatives in the battle against organised crime. In May 2012, it was involved in a major cross-border multi-agency operation carried out with An Garda Síochána which was codenamed 'Operation Quest'. The intended target was organised prostitution, with PSNI officers visiting more than 20 addresses across every county. This resulted in 5 arrests, the rescue of 3 victims of human trafficking, and the recovery of significant numbers of documents, phones, and computers as well as cash. In May 2013, after six months of intensive surveillance, 5 men were arrested for running a purpose-built underground cannabis farm in County Down. Through this operation, a total of 600 plants worth over £350,000 were seized. These and other examples of good practice demonstrate a strong commitment on the part of the PSNI Organised Crime Branch to implement effective law enforcement.

The PSNI is assisted by two national agencies, underscoring the cross-country nature of organised crime. The first is HMRC. Two Directorates within the Northern Ireland Department of HMRC are particularly pertinent to this research. The Criminal Investigation Directorate is tasked with investigating a range of organised crime offences such as fiscal and excise fraud. This Directorate is complemented by the Risk and Intelligence Service (Criminal Intelligence Group) which is responsible for profiling and criminal intelligence work. In September 2013, a joint operation by HMRC and the PSNI uncovered one of the largest fuel laundering sites, capable of producing 24 million litres of diesel annually, in County Down. In March of the same year, HMRC, Revenue, Irish Tax and Customs, and the Criminal Asset Bureau of An Garda Síochána in Ireland jointly conducted 'Operation Loft' in which 10 raids were conducted across the island of Ireland, resulting in the recovery of 40,000 litres of illegal fuel. There is no doubt that the experience and

expertise of HMRC have contributed, and continue to contribute, to the enhancement of law enforcement against fiscal/excise fraud in Northern Ireland.

The second agency is the NCA which was established by the Crime and Courts Act 2013. It builds on the work of SOCA and the Child Exploitation and Online Protection Centre, and incorporates some of the functions of the National Policing Improvement Agency. The advent of the NCA has reopened the political debate on the accountability of national agencies such as the NCA and HMRC in Northern Ireland. A question here is the extent to which devolution has an impact upon how they operate and are held accountable in Northern Ireland. The research team interviewed several SOCA officers before the transition, and they stated that certain political parties continued to have issues with the organisation due to a lack of sufficient local accountability. One example of this may be seen from the rejection by the Assembly of a consent motion tabled by the Ulster Unionist Party in February 2013 for the purpose of legislating for the NCA. Such a political sentiment has further practical implications. The establishment of the NCA on 7 October 2013 led to the removal of powers previously entrusted to SOCA in Northern Ireland, such as the powers of a constable. There is also considerable confusion about the potential impact on civil asset recovery (discussed further below). Despite this, the SOCA officers felt that their position (and that of the NCA) would be secure for the reason that a UK-wide response is necessary for organised crime. The NCA also has extensive networks abroad that could be utilised by the law enforcement community in Northern Ireland where appropriate.

One of the key findings on the work of relevant law enforcement agencies in Northern Ireland is the strong emphasis placed upon a multi-agency approach. For example, a clear line of communication/co-ordination is facilitated by CRIMNET (noted above), which allows all of those concerned to decide which agency is best placed to lead a particular investigation. Regular co-ordination meetings also take place in order to facilitate effective communication and minimise duplication of efforts, and all interviewees noted that the working relationship is fairly positive, with each agency clearly understanding their role without causing unnecessary friction and competition.

This multi-agency approach is greatly enhanced by the OCTF, which was first established in Northern Ireland in 2000 and as from 12 April 2010 comes under the auspices of the Department of Justice. The OCTF brings together the PSNI, HMRC, and other law enforcement agencies, as well as the local business community. The OCTF is structured into a stakeholder group (chaired by the Minister of Justice), a strategy group (chaired by the Director of Policing and Community Safety), and nine sub-groups. These sub-groups deal with major crimes including armed robbery, cybercrime, intellectual property crime, criminal finance, drugs, immigration and human trafficking, and fuel fraud, and most of them are chaired by senior law enforcement officers. They meet several times a year or more where appropriate. The OCTF also produces a range of important documents including annual reports and threat assessments on organised crime in Northern Ireland. These reports identify emerging trends in organised crime and provide suggestions for how these may be tackled. Another important publication is the *Northern Ireland Organised Crime Strategy* (NIOCS)⁷⁰ which sets out the main law enforcement objectives for tackling organised

⁷⁰ The Northern Ireland Organised Crime Strategy 2012-14.

crime such as making Northern Ireland a hostile environment for organised criminals, informing the public of crime trends and the work of the OCTF, and supporting communities affected by organised crime. The effectiveness of these measures is considered below.

When asked about the value of the OCTF, all interviewees stated that it has provided opportunities to build good working relationships and exchange information. While it is not a decision-making or operational body, matters discussed are often fed into ongoing practical action against organised crime. This suggests that the OCTF and sub-groups are not merely talking shops, and most interviewees concurred on this. To illustrate this with some examples, an in-depth examination of money service bureaux that have been involved in illegal activities came from discussions within the criminal finance sub-group. This has enabled those concerned to establish good working relationships, leading to the identification of widespread fraud that had direct links to dissident Republicans. Another example of good practice is the creation of an NGO engagement group for trafficking of human beings. Active participation of the civil society sector is particularly important for this crime, as they have been instrumental in providing assistance to victims and raising awareness. Finally, an emerging area where the OCTF threat assessments are being translated into operations against organised criminality is metal theft. In recent times, the PSNI has detected trends in the theft of lead from church roofs and schools as well as metal items from housing developments like radiators, copper pipes, and copper cylinders. When put together, these incidences suggested a link to organised criminality and have enabled the law enforcement agencies to put into place strategies to confront the problem.

In Ireland, law enforcement against organised crime is primarily the responsibility of An Garda Síochána's National Bureau of Criminal Investigation, which was established as an effective and active response to the proliferation of serious and organised crime. It was formed in 1997 with the amalgamation of a number of national investigation units, including the Organised Crime Unit. It works in conjunction with other departments with responsibility for organised crime including the Bureau of Fraud Investigation, the National Drugs Unit, the Criminal Assets Bureau, and the National Immigration Bureau (including the Human Trafficking Investigation and Co-Ordination Unit). One notable example of law enforcement led by An Garda Síochána is 'Operation Wireless III' conducted in November 2013. Based on proactive intelligence-led law enforcement, it conducted over 400 searches simultaneously across Ireland, targeting a variety of crimes such as drugs and firearms offences. Implementation of an operation of this magnitude demonstrates that various Units within An Garda Síochána work effectively together to promote a concerted response to organised crime. **In order to consolidate resources and efforts and to enhance efficiency, however, An Garda Síochána might consider establishing a single unit addressing all forms of organised crime, given the experience of the PSNI Organised Crime Branch.**⁷¹

Revenue, Irish Tax and Customs is an independent agency which was established by Government Order in 1923 and is tasked with collecting taxes and duties and implementing customs controls, similar to HMRC in the United Kingdom. In recent times, there has been an increased focus on certain fiscal and safety threats associated with the smuggling of drugs, tobacco, and counterfeit

⁷¹ This was also highlighted in the Third Discussion Document, 37.

products.⁷² It investigates and prosecutes appropriate cases of serious tax and duty evasion, and works with other countries and law enforcement partners in the fight against organised crime.⁷³ ‘Operation Loft’, noted above, is one such example. Revenue, Irish Tax and Customs also plays an important role in tackling drug trafficking, together with the Garda National Drug Unit and other international agencies, by facilitating controlled delivery and joint investigations. In 2013, it conducted 6,530 seizures, amounting to 992 kg of illegal drugs. The officers interviewed confirmed that their working relationship with An Garda Síochána, and its counterpart in Northern Ireland, is very positive.

Unlike Northern Ireland, Ireland does not have a formal structure akin to the OCTF. This is of course not to state that it does not appreciate a multi-agency approach. It was discovered that the opposite is true. For example, section 36 of the Garda Síochána Act 2005 requires the police to set joint policing committees to operate at local authority level and engage with a local senior police officer on a monthly basis. The aforementioned Operation Wireless III is undoubtedly a good example of efficient co-ordination within Ireland. Both An Garda Síochána and Revenue, Irish Tax and Customs have liaison officers attached to each other to facilitate effective communication and action. Interviewees from these agencies confirmed that the level of co-operation is very good. When asked if it would be useful to have an arrangement similar to the OCTF in Ireland, many Garda officers stated that they preferred the current arrangements as they were adequate for their needs. However, others have recognised certain benefits of a specific task force. **The research team also takes a view that a multi-agency approach is desirable for organised crime, and that this can be facilitated through effective communication and co-ordination without sacrificing independence or respective mandates, given the good example set by Northern Ireland. The establishment of a specific task force on organised crime can also help the relevant authorities develop a coherent and comprehensive organised crime strategy, which is currently lacking in Ireland,⁷⁴ and send a positive message to the general public as well as criminals that the government takes the issue seriously. Therefore, the research team recommends that the Irish government consider establishing a forum where relevant agencies can meet and discuss issues more regularly.**

3.2 Special Investigative Techniques to Address Organised Crime

3.2.1 International and Regional Standards

Special investigative techniques are useful and necessary in facilitating intelligence-led law enforcement. Article 20 of the Organised Crime Convention provides for the appropriate use of such techniques, including electronic or other forms of surveillance and undercover operations. Article 20(4) also makes provision for the use of controlled delivery⁷⁵ with the consent of the State Parties concerned. Regionally, the Council Framework Decision on Organised Crime noted above does not contain any provisions relating to the use of special investigative techniques. However, article 9(4) of the EU Trafficking Directive recognises that such methods should be used:

⁷² See Revenue, Irish Tax and Customs, *Annual Report 2012*.

⁷³ *ibid* 46.

⁷⁴ It is important to recognise here that the Irish government has developed strategies and action plans for particular crimes such as human trafficking, drug offences, and fiscal/excise fraud. An Garda Síochána also has Annual Policing Plans which reflect the priorities set by the government in tackling organised crime.

⁷⁵ Art 2(i) defines controlled delivery as: ‘the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more states, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.’

Member States shall take the necessary measures to ensure that effective investigative tools, such as those which are used in organised crime or other serious crime cases, are available to persons, units or services responsible for investigating or prosecuting the offences referred to in Articles 2 and 3.

This instrument lacks any definition of the form that these ‘effective investigative tools’ should take. Some guidance may be gleaned from the Council of Europe Recommendation of the Committee of Ministers concerning guiding principles on the fight against organised crime.⁷⁶ Article 19 advises that:

Member States should introduce legislation allowing or extending the use of investigative measures that enable law enforcement agencies to gain insight, in the course of criminal investigations, into the activities of the organised crime groups, including surveillance, interception of communications, undercover operations, controlled deliveries and the use of informants.

This is expanded by another Recommendation of the Committee of Ministers on ‘special investigation techniques’ in relation to serious crimes including acts of terrorism.⁷⁷ Chapter 2(a)(1) inserts the provision that Member States should, in accordance with the requirements of the ECHR, define in their national legislation the circumstances in which special investigation techniques can be used. Chapter 2(a)(3) encourages Member States to take appropriate legislative measures to ensure adequate control of special investigation techniques by judicial authorities or other independent bodies. These are essential in maintaining the legality of these measures and protecting the human rights of suspects as well as the general public.

3.2.2 National Legislation

In Northern Ireland, the key legislation relating to the use of special investigative techniques is the Regulation of Investigatory Powers Act 2000 (RIPA). RIPA contains provisions for interception of communications,⁷⁸ surveillance, and use of CHIS.⁷⁹ It should be noted from the outset that these are used to detect crime generally, and therefore the legislation does not create special powers specifically for organised crime. In relation to interception of communications, a warrant must generally be issued by the Home Secretary.⁸⁰ His/her power is to be monitored by the Interception of Communications Commissioner who holds or must have held a high judicial office,⁸¹ thereby providing some safeguards against the abuse of power. Justice McCloskey of the High Court added that having a recently retired judge for the Commissioner post would probably work better in practice, as that would appear more independent and impartial. However, prior judicial approval is not needed under RIPA. **The research team takes a view that such approval is beneficial as it would ensure compliance with RIPA and the Human Rights Act 1998 before interception is used, strengthen its justification, and avoid complaints being made at a later stage. This in turn could boost public confidence in law enforcement. Such**

⁷⁶ Rec(2001)11.

⁷⁷ Rec(2005)10.

⁷⁸ Part 1, ch 1.

⁷⁹ Part 2, ss 29, 30, and 31 (Northern Ireland) which sets out that authorisations for conduct in Northern Ireland shall be exercisable by the Office of the First Minister and deputy First Minister in Northern Ireland (concurrently with being exercisable by the Secretary of State).

⁸⁰ ss 6-8.

⁸¹ s 57.

an approach has been taken in Australia,⁸² Canada,⁸³ Germany,⁸⁴ the Netherlands,⁸⁵ Poland,⁸⁶ South Africa,⁸⁷ Spain,⁸⁸ Switzerland,⁸⁹ and the United States of America.⁹⁰ There is therefore scope for the United Kingdom to consider this further.

In terms of surveillance, there are three types stipulated under RIPA: directed surveillance, intrusive surveillance, and CHIS.⁹¹ Directed surveillance largely involves surveillance that takes place in public places and is considered less serious. If surveillance is to take place in private premises (eg in a dwelling or private vehicle), then it is considered to be intrusive. In both cases a test of proportionality must be employed before authorisation can be given.⁹² In relation to intrusive surveillance, an independent Surveillance Commissioner determines whether or not to support it.⁹³ Finally, CHIS generally refers to informants or undercover officers.⁹⁴ In 2010 the UK Home Office published a *Code of Practice for the Use of Covert Human Intelligence Sources* in line with section 71 of RIPA. This document sets out the definitions of such sources and the procedures for authorising and managing their deployment. All special investigative techniques stipulated in RIPA can be reviewed by the Investigatory Powers Tribunal.⁹⁵ These measures are in line with article 20 of the Organised Crime Convention, and the law enforcement community in Northern Ireland generally regards the current legal framework to be sufficient to tackle organised crime in terms of the powers granted to them. Further, as the legislation applies equally to terrorism, it is capable of addressing its nexus with organised crime.

Interviews with the PSNI, HMRC and SOCA reveal that these measures are used on a daily basis to investigate a variety of organised crime. Additionally, controlled delivery is used for crimes such as drug trafficking. However, surveillance is normally conducted by special surveillance officers who are part of the HQs, and many PSNI officers within the Organised Crime Branch stated that they would benefit greatly from having their own surveillance facilities. **While there are resource implications, there is no doubt that such a step would facilitate faster and more effective responses to organised crime. It is therefore recommended that Northern Ireland gives this serious consideration.**

On the subject of RIPA authorisations, all interviewees stated that respective agencies have stringent authorisation processes in place. Any request for the use of these measures must be accompanied by clear justification, and the authorising officers provide rigorous checks to ensure that requests are in line with RIPA (in terms of necessity and proportionality) and their internal guidelines. A lack of successful applications under the ‘abuse of process’ doctrine before the Northern Irish courts is one indication that the law enforcement community has been able to use special investigative techniques appropriately. A defence lawyer and judges interviewed, as well as the Interception of Communications Commissioner,⁹⁶ also concurred on this point. This should be recognised as an example of good practice.

⁸² Telecommunications (Interception and Access) Act 1979, as amended.

⁸³ Part VI of the Canadian Criminal Code.

⁸⁴ Criminal Procedure Code 2009, as amended, s 100b.

⁸⁵ Special Powers of Investigation Act 2000.

⁸⁶ Criminal Procedure Code 1997, as amended, ch 26.

⁸⁷ Regulation of Interception of Communications and Provision of Communication Related Information Act 2002.

⁸⁸ Penal Code, ss 197-199.

⁸⁹ Criminal Procedure Code 2007, art 272.

⁹⁰ 18 USC Chapter 19, §2518 (Procedure for Interception of Wire, Oral or Electronic Communications). It is important to mention, however, that the President of the United States can, under the Foreign Intelligence Surveillance Act 1978, authorise interception in relation to foreign nationals (or persons working on behalf of foreign governments) for intelligence purposes only.

⁹¹ See Part II.

⁹² ss 28 and 32.

⁹³ s 36.

⁹⁴ s 26.

⁹⁵ RIPA, Part IV.

⁹⁶ Interception of Communications Commissioner, Annual Report 2012, 20.

RIPA was recently amended by the Protection of Freedoms Act 2012. Among others, sections 37 and 38 now require judicial approval before the local authorities can obtain communication data, conduct directed surveillance, or use CHIS. This change came in response to numerous instances of abuse of these powers by local authorities.⁹⁷ Another important aspect of this legislation is that it obliges the Home Secretary to issue a code of practice on the use of CCTV and appoint a Surveillance Camera Commissioner who monitors implementation of the code. In accordance with this, the Commissioner was appointed in September 2012, and the Surveillance Camera Code of Practice was published in June 2013. These represent a step in the right direction.

It is worth noting that the 2012 Act does not extend to requests made by the law enforcement agencies. On the one hand, there is a strong argument that the existence of stringent authorisation processes may not require judicial approval. On the other hand, judicial authorisation to all forms of special investigative techniques promotes consistency in law enforcement and enhances the legality of their use. All of these can have a positive impact upon public confidence in law enforcement against organised crime. **Therefore, the research team is of the view that this should be considered further.** In return, the existing internal authorisation procedures might be relaxed. This could reduce internal frustration/friction, as well as a problem of the authorising officers reaching varied decisions on the same/similar facts, as expressed by some of the stakeholders interviewed.

Another point to note is an urgent authorisation procedure. RIPA provides for oral authorisation in urgent cases to be given for up to 72 hours when it is not possible to obtain a written authorisation.⁹⁸ It is to be acknowledged here that the law enforcement agencies sometimes must act quickly to prevent organised crime and ensure the safety of those concerned, and that good procedures are in place for this oral authorisation (eg recording of such authorisation). It is also understandable that authorising officers may not be immediately available to process written applications. **However, a question can simultaneously be raised as to whether these law enforcement agencies really require 72 hours. A shorter period seems to be a reasonable option, as that could facilitate closer monitoring and encourage officers to utilise less intrusive means of investigation as much as possible. By a way of comparison, in Australia⁹⁹ and Hong Kong,¹⁰⁰ the initial period for urgent authorisation is limited to 48 hours; in Canada, a judge can give oral authorisation for up to 36 hours;¹⁰¹ and law enforcement agencies in the Republic of Korea must obtain judicial approval within 36 hours.¹⁰² The UK government therefore could examine this further.**

In Ireland, the use of surveillance by law enforcement agencies is regulated by the Criminal Justice (Surveillance) Act 2009. Surveillance under this Act means ‘monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements, activities and communications’ or ‘monitoring or making a recording of places or things’. Similar to Northern Ireland, this Act applies to arrestable offences generally and therefore does not create special powers for organised crime per se. Interestingly, surveillance is to be approved by a judge, unlike in Northern Ireland.¹⁰³ He/she must be satisfied that surveillance is proportionate and that its

⁹⁷ Home Office, *RIPA and Local Authorities: Impact Assessment* (2010).

⁹⁸ ss 34, 36 and 43.

⁹⁹ Telecommunications (Interception and Access) Act 1979, s 10, and Surveillance Devices Act 2007, s 33.

¹⁰⁰ Interception of Communications and Surveillance Ordinance, s 22.

¹⁰¹ Criminal Code of Canada, s 184.3.

¹⁰² United Nations Office of Drugs and Crime, *Current Practices in Electronic Surveillance in the Investigation of Serious and Organised Crime* (2009), 27.

¹⁰³ ss 4-5.

duration is reasonable in achieving its objectives. Before applying to a judge, a superior officer (eg a rank above superintendent for An Garda Síochána and a rank above principal officer for Revenue, Irish Tax and Customs) will also have to consider proportionality and necessity.¹⁰⁴ This is a better model than that of Northern Ireland. A High Court Judge in Ireland, who was designated to review the surveillance powers under this Act, noted that generally the law enforcement authorities use surveillance appropriately. **However, a view was expressed by the ICCL that judicial oversight could be enhanced through more rigorous scrutiny of relevant agencies and the publication of detailed annual reports. In addition, urgent authorisation can be granted for up to 72 hours, similar to the United Kingdom. It is recommended once again that Ireland reviews this aspect of the 2009 Act. Further, the scope of the 2009 Act is limited to surveillance with the use of devices, and other measures such as covert following and observation without surveillance devices are not covered. It is desirable that legislative provision is made for all forms of surveillance for clarity and consistency. The need for a clear legal basis has also been stressed by the European Court of Human Rights on numerous occasions.**¹⁰⁵

Another relevant legislation in Ireland is the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 which allows the relevant agencies to undertake interceptions for investigation of serious crimes. Unlike surveillance noted above, the authorisation is given by the Minister of Justice, Equality and Defence. Similar to the United Kingdom, **there is a designated High Court Judge who monitors the operation of interception.**¹⁰⁶ **However, one human rights NGO has pointed out that the judicial oversight lacks transparency, and that an annual report does not contain an in-depth examination.**¹⁰⁷ **There is therefore scope for improvement in this regard. Further, an argument may also be made for prior judicial authorisation.** In light of the recent case of *DPP v Damache*,¹⁰⁸ there seems to be an increasing recognition that authorisation for intrusive measures should be given by an independent person, and a judge can certainly fulfil this role.

In addition, unlike the United Kingdom, including Northern Ireland, the use of CHIS is not underpinned by legislation. Rather, this method is regulated by An Garda Síochána's CHIS Management Policy. Part 1 sets out the case for the proper management and use of CHIS. Part 2 reflects on the ethical and human rights standards to which An Garda Síochána subscribes. Finally, Parts 3 and 4 set out the standards for the collection, storage, and use of information gathered by CHIS as well as the auditing of standards and systems in place. When asked whether a lack of legislation covering the use of CHIS may pose an issue in terms of legality and accountability, the responses provided by Garda officers varied. Several officers expressed the view that the existing Code of Practice for the use of CHIS provided adequate procedures for oversight and accountability. This document is available to all officers and provides the professional standards that are required to maintain the confidence of the public and the courts.¹⁰⁹ It appears also that judges could ask to see the file from an investigation at any time and have frequently exercised that right in practice. Further, a retired judge, known as the CHIS Oversight Authority, monitors the CHIS regime and regularly reports to the Minister of Justice, Equality and Defence. However, others argued convincingly that legislation should be drafted, as it would

¹⁰⁴ *ibid.*

¹⁰⁵ See *Malone v United Kingdom*, App no 8691/79 (1984), *Kruslin v France*, App no 11801/85 (1990), *Taylor-Sabori v United Kingdom*, App no 47114/99 (2002), *Rotaru v Romania*, App no 28341/95 (2000), and *Liberty and Others v United Kingdom*, App no 58243/00 (2008).

¹⁰⁶ s 8.

¹⁰⁷ Privacy International, *Evaluation Report of Ireland's Privacy and Surveillance Laws* (2011), <<https://www.privacyinternational.org/countries/ireland>> accessed 28 February 2014.

¹⁰⁸ [2012] IESC 11.

¹⁰⁹ *Public Statement by the Commissioner of An Garda Síochána on the Management and Use of Covert Human Intelligence Sources* (date of publication unknown).

increase the protection to CHIS and the people that CHIS come into contact with, and would also protect the Garda officers themselves. This view was also expressed by Justice Butler of the High Court and the SCC.

It is important to recognise that, similar to Northern Ireland, a good authorisation process for the use of special investigative techniques seems to be in place in Ireland. However, in terms of clarity, accountability, and human rights (including the ECHR jurisprudence noted above), it is desirable to enact comprehensive legislation which covers all aspects of special investigative techniques with detailed authorising procedures, similar to RIPA in the United Kingdom. Ireland would then be fully in conformity with the relevant international and regional standards described above.

3.2.3 Practical Aspects of Investigation

Although the legislative frameworks on substantive criminal law and special investigative techniques may be regarded as sufficient, the research team discovered a number of issues which are hampering their effective enforcement. For example, the law enforcement communities in both jurisdictions highlighted the practical difficulty in identifying criminal groups. There are a number of criminal groups which may or may not fit into the definitions noted above. Many of these are quite small in size and are network-based rather than large entities, and their relationships with each other can change from day to day framed by both co-operation and competition. This is exacerbated by the increasing presence of foreign criminals in both jurisdictions. Human trafficking is one example where many traffickers, as well as victims, are from abroad. One civil society organisation in Northern Ireland noted further that local ethnic minority groups work with the paramilitaries to commit crimes. Infiltrating these groups is difficult due to the cultural and language barriers. They also have extensive criminal networks outside of the island of Ireland, making it more vulnerable to organised crime. In order to overcome some of these difficulties, Detective Chief Superintendent Roy McComb of the PSNI Organised Crime Branch recognised the need to put more resources into the use of interpreters, the training of frontline officers, and the use of CHIS who are foreign nationals. Proactive recruitment of law enforcement officials from the ethnic minority communities would also be beneficial as they would be able to create a good rapport and working relationship with these communities. **Ireland is actively recruiting law enforcement officers from ethnic minority communities, and Northern Ireland should intensify its effort in this regard.**

The sophisticated nature of organised crime is also hampering effective law enforcement. Criminals use advanced technologies and techniques such as the internet to carry out their illegal activities. Intelligence-led law enforcement is vital and, in addition to the use of special investigative techniques noted above, it was stressed by the law enforcement communities in both jurisdictions that the powers stipulated under the proceeds of crime legislation are also useful. The relevant statutes allow them to closely monitor financial transactions of suspected offenders and piece together their criminal lifestyle. The statutes also facilitate co-operation from financial institutions, particularly in relation to reporting suspicious activities. However, it was highlighted in interviews that the proceeds of crime legislation is regarded as a specialism and

not well understood by the frontline officers.¹¹⁰ **In order to rectify this problem, more officers should be trained in financial investigation and then retained.** At a more strategic level, things have been changing. One example of good practice can be seen in the practice of the PSNI Organised Crime Branch after its restructuring in 2010. Previously, financial investigations were not systematically carried out alongside criminal investigations into organised crime. Since the restructuring, every team has been assigned a financial investigator. A similar arrangement exists in Ireland. The Garda Criminal Asset Bureau and the Bureau of Fraud Investigation are said to work closely with other Units to facilitate parallel financial investigations.

Some issues have also been raised in relation to the special investigative techniques. Many frontline officers felt that the legislation was sometimes being interpreted too strictly by authorising officers, making investigations unnecessarily difficult. It was also pointed out that the authorisation process involved much bureaucracy, wasting valuable resources that could be better spent on investigations. HMRC officers, however, highlighted the benefits of the authorisation process, arguing that it encourages professionalism in law enforcement and enhances the legitimacy of intelligence to be used in criminal investigations and prosecutions. **The research team also takes a view that stringent authorisation is necessary in order to protect the human rights of suspects and boost public confidence in law enforcement. Alternatively, judicial approval could mitigate some of these issues as explained above, if the political and law enforcement communities are willing to consider this option.**

In addition, the human rights community in Northern Ireland has raised concerns about a lack of transparency in procedures, particularly for CHIS. These included a lack of public awareness as to the extent and nature of criminal conduct that might be committed by CHIS. This indeed is a difficult issue, as the disclosure of information on covert law enforcement operations can compromise the effective investigation of organised crime. However, our research revealed that there are a number of safeguards in place to prevent the abuse of CHIS. The conduct of the PSNI is scrutinised closely by the Policing Board's independent human rights adviser. In addition, the Surveillance Commissioner regularly reviews the existing arrangements in place, and individuals can lodge complaints before the Investigatory Powers Tribunal. These should mitigate some uncertainty surrounding the use of CHIS in organised crime investigations.

The operation of CHIS has also met some criticisms in Ireland. It was stated by the Garda Ombudsman Commission in this regard that guidance on CHIS was restricted to high-ranking officers and there was not sufficient training for all officers.¹¹¹ The management of documents relating to registration/recruitment of CHIS was also regarded as inadequate.¹¹² It was acknowledged that these led to unnecessary risks in the handling and management of CHIS. Further to this, there is no mechanism to address failure to abide by the guidelines and procedures, leaving the question of accountability unclear. A report by the Garda Ombudsman in 2008 also highlighted problems with informant handling procedures, training, management, and governance. **As noted above, all of these suggest that legislation setting out clear guidance and accountability is desirable in Ireland.**

¹¹⁰ See also Third Discussion Document, 35.

¹¹¹ The Garda Ombudsman Commission, *Special Report to the Minister of Justice and Equality* (May 2013), 4

¹¹² *ibid* 6.

A lack of adequate financial, human, and technical resources to combat organised crime was another common concern expressed by the law enforcement communities in both jurisdictions. By way of example, the PSNI Organised Crime Branch has a budget of approximately £11 million, which represents less than 1% of the entire PSNI budget. This often forces the Branch to prioritise important cases with the result that some crimes or criminal groups may not receive sufficient attention. **It is therefore important that both governments allocate adequate resources if they claim to be serious about tackling organised crime.**

One way to alleviate this problem is to use criminal proceeds more effectively. Since 2011, the full value of assets confiscated from the ‘criminal recovery process’ (ie confiscation after conviction) is returned to Northern Ireland.¹¹³ One half of the pot is used to fund community projects through the Asset Recovery Community Scheme and the other half is returned to the law enforcement authorities under the Assets Recovery Incentivisation Scheme (ARIS).¹¹⁴ During 2012 and 2013, the total amount returned to Northern Ireland was £2.1 million, and £1,080,100 was distributed to partner agencies including £110,671 to the PSNI, £11,420 to HMRC, and £245,263 to the PPS.¹¹⁵ In terms of its usage for law enforcement, the ARIS money funded financial investigators and intelligence officers,¹¹⁶ and this demonstrates a good use of criminal proceeds to tackle organised crime. However, a separate arrangement exists under the ‘civil recovery process’, under which 50% of the criminal proceeds confiscated are returned to Northern Ireland as part of ARIS, but the other half is retained by the Home Office. **The research team recommends here that the criminal proceeds confiscated through civil recovery also be returned to Northern Ireland so that relevant agencies can enhance their capacity in law enforcement.**

In contrast, a similar scheme does not exist in Ireland as all criminal assets are sent directly to the Exchequer. Detective Chief Superintendent Eugene Corcoran reflected that there were arguments for and against this approach. On the one hand, it is safer and more transparent that all the money recovered is immediately transferred to the Exchequer. This view was also expressed by officers of Revenue, Irish Tax and Customs. On the other hand, those funds might be used more effectively if fed into worthy projects designed to remedy the damage caused by organised criminals. The funds could also be used to enhance the capacity of the law enforcement community in Ireland and send a clear message that criminals are not able to benefit from their activities. **The research team therefore recommends that the Irish government consider instituting a similar initiative.**

Another way to alleviate the lack of resources is to make use of external funding. Intergovernmental organisations such as the European Union and the United Nations Office of Drugs and Crime provide funding for technical assistance, capacity building, and international co-operation, and **these should be targeted more proactively by the law enforcement communities in both jurisdictions.** Employment of people dedicated to income generation is also beneficial. The PSNI already has such personnel, and this is an example of good practice.

¹¹³ OCTF Annual Report 2013, 48.

¹¹⁴ *ibid.*

¹¹⁵ *ibid* 50.

¹¹⁶ *ibid* 51.

Further, there is scope to improve the relationship with the local businesses which become part of organised crime. It has been highlighted through interviews in both jurisdictions that obtaining co-operation in money laundering investigations from financial institutions, including accountants and money service bureaus, is still difficult, although significant progress has been made. The reasons for this include a lack of sufficient training, expertise, and experience to detect and report financial crimes, the culture of fear which prevents them from reporting suspicious activities, and active collusion with criminals. Other industries such as agriculture, construction, catering, and shellfish are also known to exploit trafficked victims, and there is an acute need to educate and prevent them from engaging in slavery and forced labour. **All of these require the concerned authorities to facilitate more targeted community outreach initiatives, training, and awareness raising.**

In addition to these practical matters, there are several key human rights issues which should be highlighted in relation to criminal investigations. It is important to acknowledge from the outset that all agencies interviewed regard the protection and promotion of human rights to be an integral part of their work. In Northern Ireland, the PSNI has in-house human rights training which all officers must undergo upon recruitment. The training itself consists of workshops and online modules which individual officers can take at their own pace. There is also a specific human rights legal adviser who can be contacted by officers to seek clarification on human rights issues in law enforcement. An independent human rights adviser within the Policing Board also closely scrutinises the compliance of the PSNI. These are examples of good practice, and clearly demonstrate that the law enforcement community in Northern Ireland takes human rights seriously. One point to note, however, is that there is no compulsory human rights training for new officers after the initial training. The onus is left to each individual officer to undergo additional training, although regular updates on new/emerging human rights issues as well as national and European case law seem to be circulated widely. **The extent to which they serve as “training” is not clear, and it is recommended that more formal human rights training be provided on a regular basis. The same goes for other agencies. Also, human rights training is not generally conducted by external human rights organisations, and there is scope to make use of their expertise more proactively in the future. This could also enhance mutual trust with the civil society sector and boost public confidence in law enforcement.**

In Ireland, Garda officers reported that they are aware of human rights considerations in their day-to-day work but rarely used traditional human rights language such as articles 2 (Right to Life), 6 (Right to a Fair Trial), and 8 (Right to Private and Family Life) of the ECHR. This is mainly because of the Irish Constitution, which seems to contain as many safeguards. However, there is no doubt that the constitutional protection is complemented by the European Convention on Human Rights Act 2003, which is similar to the Human Rights Act 1998 in the United Kingdom. In terms of training, there is a human rights element in most police training, the majority of which is provided at the time of recruitment, like in Northern Ireland. Such training is also conducted when officers are promoted to a higher rank. While this may be an example of good practice, it simultaneously suggests that lower-ranking officers may only have basic human rights training. In addition, unlike the PSNI, An Garda Síochána does not have an in-house human rights adviser.

Although Garda officers can contact a department in Garda Headquarters that advises on such issues or simply contact a senior officer, the appointment of a dedicated human rights legal adviser would be beneficial particularly as Ireland lacks clear legislation on certain areas such as the use of special investigative techniques, as noted above. Once again, this could generate a positive impact on public confidence in law enforcement.

The principal human rights considerations encountered by law enforcement officers from both jurisdictions during investigation include articles 2, 6, and 8 of the ECHR. Article 2 is relevant particularly in relation to the protection of witnesses, CHIS, and victims. In relation to human trafficking, for example, several interviewees in both jurisdictions confirmed that protection of trafficked victims takes precedence even when this could affect their investigations. The same applies to the protection of witnesses and jurors from intimidation and violence and, in this sense, tackling the culture of fear may be regarded as an important part of article 2 obligations. Also, a SOCA officer highlighted a need to ensure that information used during the proceedings cannot be traced back to the source, and this means that effective witness protection is essential.

The right to privacy is another right which can be affected, particularly by the use of special investigative techniques. Under the ECHR, this right is qualified, in that it can be curtailed in the interests of national security, public safety, and prevention of crime.¹¹⁷ However, as set out in *Kennedy v United Kingdom* (2010)¹¹⁸ and other jurisprudence noted elsewhere, the use of these measures must meet three conditions: 1) existence of legal basis (in accordance with the law), 2) legitimate aim, and 3) proportionality (necessary in a democratic society). In the present case, the European Court of Human Rights continued to hold that RIPA had sufficient safeguards to protect the human rights of those affected in relation to the interception of communications (including the decision of the independent Interception of Communications Commissioner) and did not violate the ECHR. The Criminal Justice (Surveillance) Act 2009 in Ireland conforms to these principles to an extent, although there is much scope for improvement in relation to other measures not stipulated.

In addition, the treatment of suspects during investigations entails human rights implications. In Ireland, a period of pre-trial detention can be quite long. For drug trafficking, an initial maximum period of 48 hours may be extended by a further 120 hours upon application to a Circuit Court judge or a District Court judge.¹¹⁹ It was argued by a defence lawyer that an extension for this initial period is routine in Ireland. While judicial intervention adds a certain degree of safeguards, some doubts were expressed by the human rights community and defence lawyers in Ireland as to the necessity of such a long period.¹²⁰ Pre-charge detention in the United Kingdom also raises concern, particularly when organised crime has a nexus with terrorism. While the previous period of 28 days was reduced to 14 days with the Protection of Freedoms Act 2012, the human rights community has argued that the period is still long compared to other jurisdictions. This is one area of law enforcement where extra powers in relation to terrorism can be used for organised crime.

¹¹⁷ Art 8(2).

¹¹⁸ App no 26839/05.

¹¹⁹ Criminal Justice (Drug Trafficking) Act 1996, s 2. Criminal Justice Act 2007, s 50 also allows detention of up to 7 days in relation to firearm offences.

¹²⁰ See also: Third Discussion Document, 37, *Concluding Observations of the Human Rights Committee on Ireland's Second Periodic Report, A/55/40* (2000) para 17, and *Irish Human Rights Commission, Submission to the Human Rights Committee on the Examination of Ireland's Third Periodic Report* (March 2008), 22.

Another issue raised by interviewees in Ireland is access to a lawyer. In the United Kingdom, a suspect has a right to consult a duty solicitor at the police station upon arrest. In contrast, access to a lawyer is limited in Ireland. While the Irish Constitution provides that an accused is entitled to 'reasonable access', it does not provide clear guidance. In fact, lawyers are not entitled to be present during a police interview in Ireland, and concerns have been expressed by defence lawyers and the human rights community. The Department of Justice and Equality recently commissioned a Working Group to Advise on a System Providing for the Presence of a Legal Representative During Garda Interviews. This was in response to the proposed EU Directive on the Right of Access to Lawyer in Criminal Proceedings,¹²¹ which was eventually adopted in October 2013. When reporting their findings in July 2013, the Working Group acknowledged that the current policy of preventing a solicitor from being present at a Garda interview would come under increased pressure from the ECHR even if Ireland decided not to opt into the EU Directive.¹²² **Given the complex nature of organised crime and a possibility of heavier penalties, as well as the additional powers given to the law enforcement authorities, the presence of a lawyer during interviews is a reasonable step to be taken to respect and protect the right of suspects. It is also recommended that Ireland opts into the EU Directive.**

Finally, the impact of devolution of criminal justice and policing should be mentioned. Most interviewees in the island of Ireland stated that devolution has made little difference in terms of day-to-day law enforcement activities against organised crime. However, some stated that devolution is making things easier to an extent. For example, direct communication with the Justice Minister and the Department of Justice can now be facilitated, whereas in the past decisions were made in London, taking a longer time to facilitate action. It was also noted that the Department of Justice/Justice Minister have been very supportive of the work of the PSNI Organised Crime Branch. In addition, the law enforcement community has had more contact with the politicians in the Assembly in recent times. The relevant agencies often provide briefing to MLAs, and it seems that there is a strong interest within the Assembly on organised crime and law enforcement.

In summary, the law enforcement communities in both jurisdictions have played, and continue to play, an important role in investigating organised crime. Their efforts and numerous examples of good practice should be clearly and widely recognised. However, it is also evident that there are issues which are hampering effective law enforcement against organised crime. In the main, more resources should be allocated to tackling organised crime so that the concerned agencies are trained and equipped adequately for them to be able to detect and investigate organised crime. For this to happen, the wider support of the political communities as well as the general public in both jurisdictions is essential.

¹²¹ [2013] OJ L 294/1.

¹²² Report of the Working Group, 22. See also *Mader v Croatia* (2011), App no 56185/07 and *Sebalj v Croatia* (2011), App no 4429/09.

3.3 Prosecution

The PPS in Northern Ireland was established by the Justice (Northern Ireland) Act 2002 and formally came into being in 2005 as the successor to the Department of the Director of Public Prosecutions. The PPS has been described as one of the key strands of the Good Friday Agreement and the Criminal Justice Review in that it was formed to provide a prosecution service free from any power of superintendence.¹²³ The PPS is divided into four regions, each headed by a Regional Prosecutor (Assistant Director) who has overall responsibility for decisions as to prosecution, with the exception of those cases which are considered by prosecutors in the Headquarters.¹²⁴ In general, organised crime offences come under the auspices of the Central Casework Unit, which deals with cases of a serious or sensitive nature (eg terrorism offences or cases that involve the use of an informant or surveillance techniques). There are also a number of other sections within the PPS, each headed by an Assistant Director. These include Fraud and Departmental Prosecutions, Policy and Information, and High Court and International Matters.¹²⁵

In England and Wales, the Crown Prosecution Service (CPS) utilises so-called 'Legal Guidance' which describe up-to-date legal issues and charging standards in detail. Many of these are relevant to organised crime as they provide guidance relating to drug offences, fraud, human trafficking and smuggling, and money laundering.¹²⁶ These are important not only for prosecution of organised crime, but also for facilitation of consistency in decision making which can help boost public confidence in law enforcement.

In contrast, the PPS in Northern Ireland does not produce Legal Guidance regularly. It recently adopted a policy on human trafficking¹²⁷ due to a growing interest in this crime, but there are no guidelines for other forms of organised crime. This may be understandable, as various statutes relating to organised crime apply to England, Wales, and Northern Ireland simultaneously, and therefore the PPS takes account of the existing CPS guidance. Indeed, the PPS prosecutors stated that they refer to the guidance where appropriate, although they are not bound by them. However, the devolution of criminal justice and policing in Northern Ireland may require the PPS to create its own guidance in the future. When asked about this, prosecutors stated that the 'Code for Prosecutors', which is applicable to all crime, provides detailed guidance on, inter alia, evidential/public interest tests, disclosure, and unduly lenient sentences.¹²⁸ It is worth noting here that public interest considerations include offences carried out in pursuit of organised crime.¹²⁹ In addition, the PPS does produce internal guidance for prosecutors on law and practice that are relevant to organised crime, including the one on Ancillary Orders (eg Financial Reporting Orders and Forfeiture) and on appropriate venues for drug-related offences. 'Legislation Notes' are also pertinent as they ensure that the PPS prosecutors are kept up to date with relevant legislation and any subsequent changes. **However, given its complex nature, the PPS could benefit from having specific guidelines/policies on organised crime to facilitate consistency in decision making. In particular, there is a need for clearer guidelines on fuel/tobacco smuggling which are regarded as very serious in this jurisdiction, as well as civil recovery as the NCA is not currently able to exercise this function sufficiently, as will be shown below.**

¹²³ PPS, *Annual Report and Resource Accounts 2012/13*.

¹²⁴ *ibid.*

¹²⁵ *ibid* 13.

¹²⁶ CPS, *Legal Guidance* <<http://www.cps.gov.uk/legal/>> accessed 28 February 2014.

¹²⁷ *Public Prosecution Service Policy for Prosecuting Cases of Human Trafficking*.

¹²⁸ *Code for Prosecutors* (revised 2008).

¹²⁹ *ibid* 12.

Under the Justice (Northern Ireland) Act 2002, the PPS can provide prosecutorial advice to the PSNI where crimes are particularly serious. The PSNI can also approach the PPS at any stage of the investigation. One key difference between the PPS and the CPS in England and Wales seems to be that a CPS prosecutor is assigned to each case from the very beginning of the investigation whereas this is not normally the case in Northern Ireland. However in some complex cases and in others that are dealt with by the Central Casework Section, the PPS prosecutors are often assigned at an early stage of police investigation to provide prosecutorial advice and assistance. **While it is to be appreciated that this has some resource implications for a small jurisdiction like Northern Ireland, the CPS model could be adopted specifically for all cases involving organised crime to facilitate more regular communications and exchanges of evidence/intelligence.**

One further point in relation to prosecution is immunity granted to assisting offenders. Sections 71-74 of the Serious Organised Crime and Police Act 2005 allow the PPS to enter agreements with offenders to provide assistance in criminal investigations, including giving evidence. In return, the PPS may agree to provide immunity from prosecution, undertaking as to the use of evidence (that it will not be used against the assisting offenders), or undertaking to provide an account of assistance rendered to the court in support of a reduced sentence. These measures are in line with article 26 of the UN Organised Crime Convention, as well as article 4 of the EU Framework Decision on Organised Crime which oblige States to encourage offenders to co-operate, and the PPS prosecutors acknowledge that this has a potential to dismantle criminal groups and catch crime bosses who are particularly difficult to prosecute due to lack of evidence. If these provisions are used effectively, then prohibition of membership of criminal organisations perhaps is not really needed.

The CPS has published guidelines for prosecutors who wish to use immunity, undertakings, and agreements under the 2005 Act.¹³⁰ Part A sets out the general principles, including the provision that accomplices should be prosecuted whether or not they agree to be called as a witness. For that reason, full immunity from prosecution should be offered only in the most exceptional cases. The potential for providing immunity or sentence reduction should be assessed against strict criteria including the public interest test. The PPS noted that the relevant provisions in the 2005 Act were more transparent compared to in the past. However, some concerns were also expressed as to the credibility/authenticity of information provided by such offenders. Protection of those assisting offenders also poses some challenges.

One of the key issues raised by stakeholders, particularly at the prosecution stage, is the intimidation of victims, witnesses, and informants that prevents them from providing evidence. Unfortunately, it seems that prosecution of obstruction of justice is quite rare, suggesting that criminals are able to keep one step ahead of the law enforcement agencies. Also, intimidation and harming of witnesses under sections 39 and 40 of the Criminal Justice and Police Act 2001 only attracts 5 years' imprisonment. **In order to send a clear message that such conduct is not acceptable, it is recommended that the punishment regime be strengthened. In addition, community policing is regarded as extremely important in Northern Ireland, and the relevant**

¹³⁰ CPS, *Queen's Evidence - Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005* <http://www.cps.gov.uk/legal/p_to_r/queen_s_evidence_-_immunities_undertakings_and_agreements_under_the_serious_organised_crime_and_police_act_2005/> accessed 28 February 2014.

agencies should continue their efforts in this regard. This will eventually help boost mutual trust and public confidence in law enforcement.

A final point worth mentioning is the possibility of having a dedicated unit on organised crime or a prosecutor dealing with organised crime. Such arrangements were made in England and Wales with the establishment of the Organised Crime Division within the CPS in 2005.¹³¹ Detective Chief Superintendent Roy McComb argued that such a dedicated unit would be extremely beneficial, as the nature of organised crime requires those that prosecute it to be specialists in the field. While prosecutors agreed that having expertise in difficult areas is very important, they felt that it might not be necessary to designate somebody for one specific area, as they already achieve that to some extent by having a centralised team with a small number of prosecutors.

In Ireland, the Office of the DPP was established in 1974, and all indictable offences are prosecuted by the DPP in accordance with the Constitution. Like the PPS in Northern Ireland, the DPP in this jurisdiction is also an independent agency. This office has three divisions. First, there is a directing division which makes decisions on serious cases (22 prosecutors). Within this, there are sub-divisions, some of which deal specifically with organised crime such as human trafficking and corruption. Then there is a solicitors' division which implements the direction to prosecute and deals with court work. Finally, there is an administrative division. In addition, there are 32 State Solicitors operating outside Dublin who are private solicitors on contract. Unlike the PPS in Northern Ireland, where prosecutors are involved and make a decision in every case, prosecutors in Ireland have delegated some of these tasks to An Garda Síochána with the result that they make decisions in most summary or lesser offences. In relation to serious cases of organised crime, An Garda Síochána cannot charge without referring them to the Office of the DPP. This is in line with section 8 of the Garda Síochána Act 2006. The Office of the DPP has a system in place to ensure that An Garda Síochána receive direction as quickly as possible. Prosecutors are placed on a mobile phone roster a week at a time so that Garda officers can receive direction outside of hours if necessary. An Garda Síochána will also contact prosecutors regularly for their views and/or advice or to discuss a strategy in advance of taking any actions.

Also, unlike the CPS/PPS, the Office of the DPP does not have prosecution guidance/guidelines on organised crime, and given that organised crime cases are not as widespread as in the United Kingdom, there does not appear to be an acute need to create one. When asked whether prosecutors should have their own guidelines, one prosecutor answered that this would facilitate consistency in decision making. Some prosecutors felt this was not necessary as the relatively small size of the directing division (22 persons) ensures that there is good interaction between prosecutors, which, in turn, promotes uniformity in decision making. **While respecting the current arrangements in place, the research team wishes to reiterate the benefits of having clearer guidance on organised crime, and therefore recommends that Ireland considers developing them.**

In Ireland, immunity from prosecution might be offered by the DPP in order to elicit useful evidence and co-operation in prosecuting and punishing organised crime. Aside from the area of cartel

¹³¹ See CPS, *Organised Crime Division* <http://www.cps.gov.uk/your_cps/our_organisation/ocd.html> accessed 28 February 2014.

immunity under the Competition Act 2002, there is no statute providing detailed guidance on immunity and other measures like the Serious Organised Crime and Police Act 2005 in the United Kingdom, although there is an internal guideline on the matter. On this issue, the Deputy Director of Public Prosecutions stated that the current system works well and therefore that there is no pressing need to legislate. Another prosecutor noted that the granting of immunity and other measures is used sparingly in practice because evidence emanating from such source is treated with much more caution by a judge or jury. This was also confirmed by a defence lawyer. **However, similar to the use of special investigative techniques, a lack of legislation raises issues in terms of transparency and legality. The research team therefore recommends that Ireland considers legislating on this issue.**

Obstruction of justice was also highlighted as a problem in Ireland, and it seems that the culture of fear is evident in this jurisdiction as well. Compared to the United Kingdom, this offence attracts 15 years' imprisonment under section 41 of the Criminal Justice Act 1999, as amended by the Criminal Justice (Amendment) Act 2009. **This is an example of good practice as Ireland clearly recognises the significance of punishing this offence. Ireland also has an excellent tradition of facilitating community policing much like Northern Ireland, and the relevant agencies should continue their efforts in order to reduce this culture of fear.**

3.4 Cross-Border Co-operation

3.4.1 International/Regional Standards

Internationally, there are a few instruments which facilitate international co-operation. The Organised Crime Convention is one example. Article 16 obliges States to facilitate extradition, and article 17 touches upon transfer of prisoners. In addition, article 18 sets out a range of measures connected to 'Mutual Legal Assistance' including the sharing of judicial documents, executing searches, and seizing and freezing assets, whereas article 19 obliges States to consider concluding bilateral or multilateral agreements on joint investigations. In addition to the Organised Crime Convention, the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 also contains provisions related to mutual legal assistance,¹³² transfer of proceedings,¹³³ and other forms of co-operation and training.¹³⁴

Regionally, police and judicial co-operation in criminal matters has experienced a gradual evolution under the Treaty on European Union which was later revised by the Treaty of Amsterdam in 2000. When the Lisbon Treaty came into force in 2009, the EU became a single entity, and its functions are now stipulated under the Treaty on the Functioning of the European Union. This treaty contains provisions relating to the Area of Freedom, Security and Justice under Title V, and the key principles relevant to the fight against organised crime are an approximation of national criminal laws and procedures, mutual recognition of judicial decisions, and the principle of availability (intelligence exchange).

¹³² Art 7.

¹³³ Art 8.

¹³⁴ Art 9.

These principles have been facilitated through a variety of legal instruments and other measures. One example is the incorporation of the Schengen Agreement 1985 and the Schengen Convention 1990 into the EU legal framework by the Treaty of Amsterdam (Schengen Acquis).¹³⁵ It contains enhanced provisions for police co-operation including cross-border surveillance, hot pursuit, and the establishment of the Schengen Information System (SIS). Both the United Kingdom and Ireland were not initially part of the Schengen Convention. The United Kingdom subsequently decided to opt into some arrangements relating to police and judicial co-operation in criminal matters in 2000,¹³⁶ and Ireland followed suit in 2002.¹³⁷ In relation to customs co-operation, the Naples II Convention is important. Similar to the Schengen Acquis, it encourages Member States to facilitate 'special forms of co-operation', including hot pursuit, cross-border surveillance, controlled delivery and joint investigation teams.¹³⁸ Both the United Kingdom and Ireland ratified this instrument. Under the transitional arrangements of the Lisbon Treaty, they have a right to opt into measures under Title V.

Another important measure worth mentioning is the European Arrest Warrants (EAWs)¹³⁹ regime that has made significant changes in the way extradition is carried out by EU Member States. Under article 2 of the EAW Framework Decision, the requirement for double criminality has been removed for a wide range of organised crime. A minimum threshold has also been applied so that a warrant can only be issued when an offence is punishable by imprisonment for 1 year or more or, in the case of the offences set out in article 2(2) (where proof of correspondence is not required), 3 years. In addition, a prescribed time limit of 10 days has been imposed for the execution of a request where the requested person has consented to surrender. When a requested person refuses to consent to his or her surrender, the executing judicial authority should make a final decision within 90 days.¹⁴⁰

There are other instruments designed to encourage cross-border co-operation. article 13 of the Convention on Mutual Legal Assistance in Criminal Matters 2000¹⁴¹ encourages the EU Member States to set up joint investigation teams (JITs) with a view to improving police co-operation. Such teams can consist of judicial and police authorities from at least two Member States and carry out criminal investigations into specific matters for a limited period.¹⁴² Other relevant instruments include the Council Framework Decisions on the Application of the Principle of Mutual Recognition to Financial Penalties,¹⁴³ and to Confiscation Orders,¹⁴⁴ the Council Framework Decision on Simplifying the Exchange of Information and Intelligence between Law Enforcement Authorities of the Member States of the European Union,¹⁴⁵ and the Council Decision on the Stepping Up of Cross-Border Co-operation, Particularly in Combating Terrorism and Cross-Border-Crime.¹⁴⁶ Finally, outside of the EU legal order, the European Convention on Mutual Assistance in Criminal Matters 1959¹⁴⁷ is also relevant.

¹³⁵ Protocol No 19.

¹³⁶ Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis [2000] OJ L 131/43.

¹³⁷ Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis [2002] OJ L 64/20.

¹³⁸ Title IV.

¹³⁹ Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedure between Member States [2002] OJ L 190/1.

¹⁴⁰ Art 23.

¹⁴¹ [2000] OJ L 197/1.

¹⁴² para 1.

¹⁴³ [2005] OJ L 76/16.

¹⁴⁴ [2006] OJ L 328/59.

¹⁴⁵ [2006] OJ L 386/89.

¹⁴⁶ [2008] OJ L210/1. See also Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border-crime with respect to its application [2008] OJ L210/12.

¹⁴⁷ ETS No 30.

3.4.2 National Legislation

In the United Kingdom, including Northern Ireland, the Extradition Act 2003 incorporates the regime of EAWs. In return for streamlining extradition within EU Member States, the legislation contains several safeguards to protect the rights of suspects/defendants. For example, it provides for a number of grounds for refusal, including double jeopardy, extraneous consideration (where there is the likelihood of persecution or no guarantee of a fair trial), passage of time, age, and the rule of speciality.¹⁴⁸ Another notable aspect of the Extradition Act 2003 is the inclusion of human rights considerations as an additional ground for refusal. Section 21 provides that a judge must decide whether extradition would be compatible with the United Kingdom's obligations under the ECHR, and this goes further than what is set out in the EAW Framework Decision. According to the Recorder of Belfast, issues are occasionally raised relating to article 3 (where defendants could face inhuman treatment back home)¹⁴⁹ or article 8 (where they have strong family ties in Northern Ireland). In practice, most of these cases are generally unsuccessful as they lack merit in practice. This seems to be in line with the ECHR jurisprudence that it is only in exceptional cases where protection of human rights would outweigh the legitimate aim of preventing serious crime including organised crime.¹⁵⁰ In any event, judges in Northern Ireland agree that these safeguards are rigorously examined and applied where appropriate.

The use of EAWs attracted widespread support from officers in the PSNI, PPS, and SOCA. They are issued and received quite frequently in Northern Ireland. Generally the vast majority of EAWs come in from Eastern Europe, including Lithuania, Poland, and Slovakia. Ireland was described as the next highest user. The PSNI receives a higher number of EAWs than they would issue, and in numerical terms, there could be at any one time about 40 to 50 that they are working on. The Northern Ireland branch of SOCA relied upon the EAWs much less, perhaps only once or twice a year. A relative lack of reliance on EAWs by SOCA was also confirmed by the Recorder of Belfast and by Judge Miller of the County Court. All of these seem to indicate that extradition relating to organised crime is not as frequent as in the rest of Great Britain, and that criminals are prosecuted and punished in appropriate jurisdictions in most cases.

A common opinion expressed by the PPS, PSNI, and SOCA was that the scrapping of EAWs would be problematic if there was no suitable alternative. Justice McCloskey also agrees that the EAW is a very important instrument which facilitates good cross-border co-operation. The key principle behind the implementation of EAWs is mutual recognition of judicial decisions noted above, and the judges in both jurisdictions stated that mutual recognition has been facilitated smoothly between the two jurisdictions, thanks partly to the historical foundation and cultural similarity, and partly to the fact that both the United Kingdom and Ireland have a shared common law tradition. This is an example of good practice where the EU principle is successfully implemented at the national level. However, defence lawyers interviewed made an important point that mutual recognition and trust are still difficult to achieve with civil law jurisdictions in continental Europe as the criminal procedures are different.

Another important piece of legislation is the Criminal Jurisdiction Act 1975. Under the Act, a range of offences committed within Ireland can be tried in Northern Ireland. Reciprocal arrangements

¹⁴⁸ ss 12-17.

¹⁴⁹ See, for example, *Lithuania v Campbell* [2013] NIQB 19, where extradition was refused by the Northern Ireland Court as the defendant would likely be held in conditions in breach of art 3 of the ECHR.

¹⁵⁰ *King v United Kingdom*, App no 9742/07 (2010).

are contained in the Criminal Law (Jurisdiction) Act 1976 in Ireland.¹⁵¹ These include murder, manslaughter, kidnapping or false imprisonment, and some criminal damage offences and offences against the person. Schedule 1 of the 1975 Act also includes hijacking, explosive substances offences, and firearms offences. The main thrust behind these statutes was the need to address terrorism more effectively. However, in a session of the Parliamentary Northern Ireland Affairs Committee dedicated to cross-border co-operation, the PSNI raised an important question of whether the list of offences should be updated beyond terrorism-related crimes. In particular, Deputy Chief Constable Gillespie suggested that organised crime such as human trafficking, e-crime, money laundering, and fraud should be included.¹⁵² The law enforcement officials, judges, and criminal lawyers interviewed in both jurisdictions also responded that the time is right to update respective legislation, and **the research team regards this as a reasonable step forward. However, a reservation was expressed by the ICCL in light of the discrepancies relating to the treatment of defendants as highlighted above. This is an important point, and if this legislative change is to happen, both governments should ensure fair treatment of defendants.**

There are a few more relevant statutes to be mentioned. The Criminal Justice (International Co-operation) Act 1990 enables the United Kingdom to co-operate with other States in criminal proceedings and investigations. The Crime (International Co-operation) Act 2003 is also pertinent. It touches upon mutual provision of evidence between the UK and other governments, execution of asset freezing orders, and transfer of prisoners. Another important aspect is that, together with the Police Reform Act 2002, the 2003 Act has incorporated the EU Framework Decision on JITs. Finally, the aforementioned Naples II Convention has been implemented through the existing legislative provisions, namely the European Communities Act 1972 and section 9 of the Customs and Excise Management Act 1979.

In relation to prosecution of cross-border offences, the CPS has published guidance on how to deal with jurisdictional conflicts.¹⁵³ The document draws upon the Eurojust Guidelines on the matter,¹⁵⁴ which sets out the preliminary presumption that, if possible, a prosecution should take place in the jurisdiction where the majority of the criminality occurred. This is based upon the exercise of territorial jurisdiction, which is a fundamental principle under international law. Other factors that may arise include the location of the accused and extradition and surrender procedures as well as the interests of victims and witnesses. It cautions, however, that the relative sentencing powers of courts must not be a primary factor in deciding in which jurisdiction a case should be prosecuted. By way of illustration, in the case of Matyas Pis,¹⁵⁵ the defendant trafficked two women from Hungary via Dublin airport to Belfast for the purpose of sexual exploitation. It was evident that the substantive offences of sexual exploitation and trafficking occurred in Northern Ireland, and therefore a decision was taken to prosecute him in this jurisdiction. It was confirmed by prosecutors in both jurisdictions that generally no problem arises in making this type of decision as they are able to communicate with each other closely and effectively to avoid jurisdictional conflicts.

¹⁵¹ s 14.

¹⁵² Northern Ireland Affairs Committee, *Second Report, Cross-Border Co-operation between the Governments of the United Kingdom and the Republic of Ireland* (2009).

¹⁵³ CPS, *Jurisdiction* <http://www.cps.gov.uk/legal/h_to_k/jurisdiction/#an12> accessed 28 February 2014.

¹⁵⁴ *Eurojust Guidelines: Making the Decision - Which Jurisdiction Should Prosecute?* <http://www.cps.gov.uk/legal/h_to_k/jurisdiction/#an12> accessed 28 February 2014.

¹⁵⁵ [2012] NICC 14.

Ireland also seems to have a good legislative framework to facilitate international co-operation. The European Arrest Warrant Act 2003 is one example. Incoming requests are passed to the Department of Justice and Equality Central Authority) and then to the Office of Chief State Solicitor, which seeks the endorsement of the High Court. Outgoing requests are forwarded by the Office of the DPP to the Department of Justice and Equality, which in turn transmits them to the requested States.¹⁵⁶ Similar to the Extradition Act 2003 of the United Kingdom, the Irish legislation also contains a number of safeguards, including compatibility with the ECHR.

The Irish government recently published its Annual Report for 2012 on the operation of the European Arrest Warrant Act 2003. According to this, Ireland received 313 EAWs from Member States, with 51 of these coming from the United Kingdom, including 11 from Northern Ireland.¹⁵⁷ The principal offences cited were: murder/grievous bodily harm (22), sexual offences including rape and sexual abuse of children (13), drugs offences (34), organised crime/robbery (116), fraud (77), and human trafficking (1).¹⁵⁸ Ireland also issued 88 EAWs to other Member States in 2012 with the majority of these (55) being transmitted to the United Kingdom.¹⁵⁹ Officers from An Garda Síochána, prosecutors, and a High Court Judge confirmed that EAWs are an effective resource and are normally carried out relatively quickly.

In terms of other cross-border co-operation, several other statutes are worth mentioning. First, the Criminal Justice (Joint Investigation Teams) Act 2004 incorporates the aforementioned EU Framework Decision on JITs. A decision to co-operate is made by the Garda Commissioner. In addition, the Irish government has enacted another piece of legislation, the Criminal Justice (Mutual Assistance) Act 2008, which conforms to the *Council Decision on the Stepping Up of Cross-Border Co-operation* noted above. It includes provisions on taking evidence in connection with criminal investigations or proceedings in another country,¹⁶⁰ search for and seizure of material on behalf of another country,¹⁶¹ and confiscation and forfeiture orders made in another country.¹⁶² Further, in relation to customs co-operation, the Customs and Excise (Mutual Assistance) Act 2001 provides a legal basis to implement the Naples II Convention, whereas the Criminal Justice (Mutual Assistance) 2008 facilitates other law enforcement co-operation. In summary, both jurisdictions seem to have sufficient legislative frameworks to facilitate cross-border co-operation, and they are generally in line with the relevant international and European standards.

3.4.3 Practical Aspects of Cross-Border Co-operation

From a practical point of view, all interviewees in both jurisdictions said that the state of affairs in relation to cross-border co-operation is generally positive. In Northern Ireland, a formal request for evidential matters is made through International Letters of Request (ILORs) issued by the PPS or judiciary¹⁶³ that are communicated to the Department of Justice and Equality in Dublin. If a request relates to coercive measures such as the execution of a search warrant, that would go to the Home Office in the first instance, and then would be relayed to its counterpart in Ireland.¹⁶⁴ In relation to requests from Ireland, they are made through the DPP and/or the Department of Justice and Equality, and are communicated to their counterparts in the United Kingdom. It understandably takes a long time to draft ILORs, and some frustrations were expressed by the

¹⁵⁶ Department of Justice and Equality, *The European Arrest Warrant, a Guide to Irish Procedures* (January 2006), 7-10.

¹⁵⁷ *ibid* 15.

¹⁵⁸ *ibid* 8.

¹⁵⁹ *ibid* 20.

¹⁶⁰ ss 62-75.

¹⁶¹ ss 31-48.

¹⁶² ss 49-57.

¹⁶³ 2003 Act, s 7.

¹⁶⁴ See, for example, POCA, s 72.

law enforcement officers during interviews as this often results in delays in criminal investigations. Therefore careful consideration seems to be given beforehand in deciding exactly what the law enforcement officers wish to achieve. Another example of formal co-operation is the adoption of the 'Inter-Governmental Agreement on Police Co-operation'¹⁶⁵ which provides for a range of functions designed to improve cross-border law enforcement in the island of Ireland. These include the facility for police officers from Northern Ireland to apply for posts in An Garda Síochána and vice versa. It also provides for the organisation of an annual cross-border conference, training on cross-border policing, appointment of expert groups to review the existing arrangements, and facilitation of joint investigations.

While respecting these and other formal arrangements for co-operation, it was discovered through interviews that a more informal approach to cross-border co-operation is facilitated regularly. Frontline officers and prosecutors have their own contacts and can simply pick up a phone to ask question and exchange information. They also have regular face-to-face meetings as everything cannot be done through emails and phone calls. The key to successful cross-border co-operation is the ability to build a good personal/working relationship, and it is important to highlight here that the law enforcement communities in both jurisdictions have been able to do that. There are examples of good practice to illustrate this. In 2011, An Garda Síochána and the PSNI conducted a joint drug trafficking operation that targeted one particular criminal group, resulting in the seizure of 337 kg of cannabis resin worth over £1.58 million (€2 million) as well as the arrests of 5 gang members.¹⁶⁶ More recently in 2013, HMRC and Revenue, Irish Tax and Customs jointly co-ordinated 'Operation Loft' as noted above. These and other examples demonstrate that the law enforcement communities in both jurisdictions work well together, and this was also acknowledged by the UK Parliamentary Northern Ireland Affairs Committee back in 2009.

There are other ways to facilitate cross-border co-operation. For example, the OCTF sub-groups on human trafficking and fuel enforcement include representatives from Ireland. This ensures direct communication and facilitation of good working relationships. Staff exchanges also take place regularly within the law enforcement communities between both jurisdictions. Interestingly, such exchanges are governed by legislation in Ireland, namely the Garda Síochána (Police Co-Operation) Act 2003. **However, such exchange does not seem to be common for Revenue, Irish Tax and Customs, and its desirability was expressed by some officers.** In addition, there is an annual cross-border conference where the law enforcement communities meet and discuss issues of mutual interest, although it could be asked whether one conference per year is sufficient. Finally, both An Garda Síochána and the PSNI now publish a joint *Cross-Border Organised Crime Assessment*. These are once again examples of good practice, and it seems clear that some measures stipulated under the aforementioned Inter-Governmental Agreement are being implemented by both jurisdictions.

Moreover, An Garda Síochána and the PSNI have published a joint *Cross-Border Policing Strategy* in 2010 which builds on existing practical and strategic co-operation and identifies a number of key strands of work that can strengthen co-operation. Paragraph 2.1 provides for the

¹⁶⁵ Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland on Police Co-operation (April 2002).

¹⁶⁶ Cross-Border Organised Crime Assessment 2012, 10.

establishment of a joint Tasking and Co-Ordination Group. Paragraph 2.5 sets out a mandate for a proactive multi-agency immigration strategy for the policing of the borders between An Garda Síochána, the PSNI, the UK Border Agency, and the Irish Naturalisation and Immigration Service. In addition, paragraph 3.1 calls for an examination of legislation with a view to putting forward proposals to respective departments that would enhance current cross-border crime fighting functions. Other measures include intelligence sharing,¹⁶⁷ cross-border communication,¹⁶⁸ and enhanced training.¹⁶⁹ One example of good practice is the establishment of the Cross-Border Tobacco Fraud Enforcement Group, consisting of An Garda Síochána (Criminal Assets Bureau, in particular), the PSNI, HMRC, Revenue, Irish Tax and Customs, and SOCA (NCA).¹⁷⁰

Finally, judicial co-operation is worth mentioning. The Recorder of Belfast stated that regular communications take place with judges in Ireland. Therefore, an informal approach is also facilitated at the judicial level. In addition, judges in the island of Ireland have opportunities to meet on a regular basis, particularly through the Judicial Studies Board where a few joint meetings take place. There is also a conference every two years or so, similar to the law enforcement cross-border conference. These regular contacts have helped judges to build mutual trust and confidence. While judges would like to see more opportunities like this, it was noted that a lack of funding has prevented this.

While the legislative frameworks and their implementation in relation to cross-border co-operation seem sufficient, some issues and problems have been identified simultaneously. Cross-border surveillance is one such example. In Europe, this is facilitated by the Schengen Acquis noted above. Article 40 permits authorised cross-border surveillance, and in urgent cases it also allows surveillance of up to 5 hours without prior authorisation. Article 41 touches upon hot pursuit. The United Kingdom has opted into article 40 but not article 41. The central government has recently expressed its view that article 40 is a quite effective arrangement compared to ILORs, which are slow and time-consuming.¹⁷¹ Consequently, it is likely that the United Kingdom will remain part of this arrangement. In contrast, Ireland opted into neither of these provisions. Similarly, in relation to customs co-operation, the United Kingdom decided not to be part of the hot pursuit provision of the Naples II Convention, and Ireland has opted out of hot pursuit, cross-border surveillance, and covert investigation.¹⁷² **Effective communication and co-ordination may not necessitate the UK law enforcement officers continuing any surveillance into Ireland as that task may be taken up by their Irish counterparts instead. However, in extremely urgent circumstances where communication or co-ordination is not possible, it would be helpful to have an option of continued surveillance for a limited period. Some officers interviewed also supported this. Therefore, Ireland might consider opting into article 40 of the Schengen Acquis as well as relevant provisions of the Naples II Convention. However, the importance of clarifying the issue of accountability was highlighted by the ICCL.**

Another point to be noted is the reluctance of An Garda Síochána to take an active part in JITs despite the existence of domestic legislation. When asked about this, many Garda officers did not see the need for this facility as they regarded the current arrangements between the two jurisdictions as sufficient. Normally cases with a cross-border element are dealt with through

¹⁶⁷ paras 4.1 and 4.2.

¹⁶⁸ paras 5.1 and 5.2.

¹⁶⁹ para 6.1.

¹⁷⁰ Dail Eirann Debate, Written Answer 169, 'Illicit Trade in Tobacco' (54483/13) (18 December 2013).

¹⁷¹ House of Commons European Scrutiny Committee, *The UK's Block Opt-Out of Pre-Lisbon Criminal Law and Policing Measures* (October 2013), paras 346-349.

¹⁷² Customs and Excise (Mutual Assistance) Act 2001.

parallel investigations by the PSNI and the Garda with information passed back and forward informally, or through ILORs for transfer of evidence. The fact that the island of Ireland is based upon the common law tradition also facilitates smoother co-operation compared to other European jurisdictions. One officer also described how this policy only works properly when both parties have an interest in an investigation. Problems can occur when law enforcement agencies in one jurisdiction have little interest in an investigation and must be persuaded to deploy additional resources by their counterparts across the border. It was also noted that investigators naturally would like to guard their intelligence as much as possible, but they would have to involve other stakeholders if JITs were to be set up, potentially causing problems in terms of data protection. However, PSNI officers frequently expressed the benefits that JITs have for cross-border co-operation as they do not require a long process such as ILORs, allowing people to 'get on with their job'. Revenue, Irish Tax and Customs is also quite active in facilitating JITs with HMRC based upon the Naples II Convention. **Therefore, the time may be ripe for the An Garda Síochána to consider facilitating this regime more proactively.**

Moreover, there is still room for improvement in the day-to-day co-operation between police officers on the ground to ensure that co-operation that is taking place at a higher level is implemented in practice. A similar sentiment was expressed by prosecutors. In particular, there is sometimes a lack of clarity on whether the PSNI or the Garda are leading an investigation. This can have practical implications in terms of search and seizure, as well as the testing of forensic evidence, and once again the benefit of JITs should be reiterated here.

While respecting the usefulness and benefits of informal co-operation which already exists between both jurisdictions, many of the difficulties mentioned in this section could be alleviated by more regular face-to-face contacts. Although annual cross-border conferences noted above are important, their usefulness has been questioned in terms of their ability to facilitate relevant, substantial, and continuing discussions on law enforcement matters. In addition, this conference seems to be more police-focused and does not appear to be as relevant to other agencies. In this regard, the establishment of a cross-border multi-agency taskforce on organised crime, which would examine all aspects of organised crime and meet several times a year, may be a way forward not only for information/intelligence exchange but also for strengthening mutual trust. A starting point perhaps is for the North-South Ministerial Council, established by the Good Friday Agreement 1998, to add justice as one of the areas of co-operation.

3.4.4 The Role of European Union Agencies in Cross-Border Co-operation

3.4.4.1 Eurojust

Eurojust was established in 2002 to strengthen the fight against serious and organised crime within the EU Member States. The legal basis for its operation has undergone a series of amendments, with the most relevant instrument being the Council Decision adopted in 2009.¹⁷³ Its main body, Eurojust College, consists of National Members from each Member State who are police officers, prosecutors, or judges in their respective jurisdictions. Its main function is to co-ordinate and assist the investigation and prosecution of crimes with a cross-border dimension,

¹⁷³ [2009] OJ L 138/14. It should be mentioned here that a new Proposal to reform Eurojust is under consideration. See *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the European Union Agency for Criminal Justice Cooperation (Eurojust)*, COM (2013) 535 final (July).

and to this end it hosts co-ordination meetings with relevant Member States on a regular basis. It also deals with ILORs, EAWs, and provides funding and expertise to set up JITs.

Much of Eurojust's work relates to organised crime. In 2012, of the 1,533 cases that Eurojust processed, 727 related to drug trafficking, human trafficking/smuggling, money laundering, and criminal groups.¹⁷⁴ The UK and Irish National Desks of Eurojust are contacted regularly by the law enforcement communities in both jurisdictions if crimes have an European dimension, and they are normally quick in providing required information and identifying colleagues in other Member States who might be able to help further. JITs are also co-ordinated by Eurojust in many cases. One recent example is a JIT organised by Northern Ireland and Sweden in relation to human trafficking in April 2013. The PSNI and the PPS worked together with their Swedish colleagues, resulting in two convictions and victims being rescued.

Interestingly, the UK National Member of Eurojust noted that there is scope for the agency to be better utilised by the law enforcement community in Northern Ireland. While the United Kingdom has the most JITs benefitting from funding provided by Eurojust, the majority of them involve England and Wales, and there is scope for Northern Ireland to make more proactive use of this. That said, Northern Ireland is involved in a number of JITs, and the expectation is that this number will increase. Also, while a judge can be a National Member, there is not representation from the United Kingdom judiciary. The UK National Member explained that this is due to the differences in criminal justice systems across Europe. In continental Europe, investigative judges in the civil law jurisdictions are part of criminal investigations, and therefore are eligible to be part of a JIT (in some cases as a JIT leader). In contrast, this is not the case in common law systems such as the United Kingdom and Ireland. When asked whether the Eurojust UK National Desk should also have a representative (eg a prosecutor) from Northern Ireland, the National Member stated that although this might be helpful, it may be difficult for the PPS to justify as there are currently not enough cases being forwarded to Eurojust. The UK National Desk and the PPS also work well remotely through regular communication. Further, the PPS is also a member of the Eurojust Consultative Forum of Prosecutors at a senior level, and attends meetings when required.

This under-utilisation is even more evident in Ireland. According to the *Eurojust Annual Report 2012*, 17 requests for assistance were received by Eurojust from the Irish law enforcement community. The Irish National Member participated in only 3 co-ordination meetings in 2012, compared to 46 meetings for the UK National Member.¹⁷⁵ This figure alone does not clearly indicate that Eurojust is under-utilised by the Irish law enforcement community. It may be that the majority of the cases do not require the involvement of Eurojust as the Garda already works quite well with its counterparts in other Member States. In that regard, Detective Chief Superintendent Eugene Corcoran confirmed that there are other avenues more traditionally used by the police—Europol and Interpol being two.

One way to make the work of Eurojust more relevant to the Irish law enforcement community could be to have a representative from the An Garda Síochána. When asked about this possibility, Garda officers were somewhat hesitant. Detective Chief Superintendent Eugene Corcoran noted

¹⁷⁴ Eurojust, *Annual Report 2012*, 58-59.

¹⁷⁵ *ibid* 62.

that Gardaí already had someone in place at Europol and there would be a risk of duplication of effort if the same policy were to be applied to Eurojust. **While their views and the current state of affairs should be respected, Eurojust does bring some benefits, such as funding to conduct JITs. Therefore, An Garda Síochána should consider using its services more proactively.**

3.4.4.2 Europol

The European Police Office (Europol) was originally established in 1995 and became operational in 1999. Similarly to Eurojust, the legal basis for its operation has undergone a series of amendments, the most relevant instrument being the Council Decision adopted in 2009.¹⁷⁶ Europol does not have the power to conduct its own investigation across Europe. Like Eurojust, its main role is facilitation and co-ordination of criminal investigations among Member States as well as intelligence gathering. Interviews in both jurisdictions revealed that Europol were contacted frequently. Some issues noted in Northern Ireland included the fact that the PSNI do not yet have access to the Europol European Information System and this can only be done through the NCA. **Allowing such access could contribute to speedy implementation of an appropriate response, and therefore the UK government should consider this. Further, the benefits of incorporating a Northern Ireland desk at Europol were also raised and should be explored, as other agencies such as NCA and HMRC have representations.**

In Ireland, it was noted that An Garda Síochána communicates and co-ordinates activities regularly with Europol through its National Europol Office. A good example of co-operation is ‘Operation Oakleaf’ conducted in 2013 which involved the theft and smuggling of Rhino horn artefacts, primarily by a group of travellers from Rathkeale in County Limerick. The cross-border nature of this crime and the large profits that it produces have attracted the interest of Europol, which worked closely with An Garda Síochána to achieve significant prosecutions and the seizure of assets.

In summary, European agencies have played and continue to play an important role in facilitating cross-border co-operation, and both jurisdictions benefit from their services occasionally. However, given that the existing bilateral arrangements seem to be working well and that these are much simpler and less time-consuming, it was discovered that there is, in practice, little use of these agencies when it comes to cross-border co-operation between the two jurisdictions.

¹⁷⁶ [2009] OJ L 121/37. Similar to Eurojust, a Proposal to reform Europol is under consideration. See *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the European Union Agency for Law Enforcement Co-operation and Training (Europol)*, COM (2013) 173 final (March).

Section 4: Criminal Proceedings and Confiscation of Criminal Proceeds

Offences relating to organised crime are tried in a number of different courts depending on their circumstances in both jurisdictions. The vast majority of all criminal offences are tried summarily in magistrates' courts in Northern Ireland and in the District Courts in Ireland. Magistrates have powers to sentence defendants up to 12 months where indictable offences are being tried summarily. Similarly, the District Courts in Ireland can sentence defendants for minor offences up to 12 months. The more serious indictable offences are tried in the Crown Court in Northern Ireland. In Ireland, these are tried in the Circuit Court or the Central Criminal Court (where the High Court exercises criminal jurisdiction). The former does not have jurisdiction over murder, rape, aggravated sexual assault, treason, and piracy, all of which are heard in the Central Criminal Court. Finally, offences relating to terrorism or organised crime can be tried before the SCC.

4.1 Trial Without Jury

A significant feature of criminal proceedings in both jurisdictions is the existence of trial by jury. Having said this, there are certain arrangements under which a trial can be held without jury, and this applies to organised crime as well. In Northern Ireland, the Justice and Security (Northern Ireland) Act 2007 allows the DPP to issue a certificate that any trial on indictment be conducted without a jury where the offences involve 'proscribed' organisations and he/she is satisfied that there is a risk of administration of justice being impaired. Such trials came to be known as 'Diplock trials' in this jurisdiction (and are still widely referred to as such) because it was Lord Diplock's report into emergency procedures in Northern Ireland in 1972 that recommended this arrangement. As noted elsewhere, paramilitary groups commit organised crime, and this legislation can be used to prosecute them. It is important to highlight here that the 2007 Act provides for limited judicial scrutiny of decisions made by the DPP. They cannot be questioned in any court of law except on the grounds of dishonesty, bad faith, or other exceptional circumstances (including a lack of jurisdiction or error of law) or on the ground that there has been an infringement of a Convention right.¹⁷⁷ **In order to enhance and maintain the legitimacy of the non-jury trial and public confidence in law enforcement, it is recommended that the legislation is amended to allow a greater degree of judicial scrutiny over the DPP's decisions.**

In addition, there is a provision under section 44 of the Criminal Justice Act 2003 whereby an application may be made for a non-jury trial due to a risk of jury tampering. In practice, a non-

¹⁷⁷ Justice and Security Act 2007, s 7(1). An unsuccessful challenge was made, for example, in *Re Brian and Paula Arthurs* [2010] NIQB 75.

jury trial under this Act is rare for organised crime, and this has been confirmed by the Recorder of Belfast.¹⁷⁸ This is partly due to the difficulty in getting concrete evidence of intimidation. It is also important to note that a higher threshold is set when offences do not involve proscribed organisations. First, there is judicial oversight over applications by the DPP. Second, a judge must be satisfied, among other matters, that there is evidence of a real and present danger that jury tampering would take place. Given the culture of fear noted elsewhere, proving this might be difficult. **What is desirable, then, is a more proactive approach in addressing jury tampering and intimidation. One example of good practice is the aforementioned 2007 Act under which jury members are now identified by numbers, thereby protecting their personal information.**¹⁷⁹

When asked whether a non-jury trial is appropriate for cases involving organised crime, the Recorder of Belfast and Justice McCloskey of the High Court stated that it would be, provided that sufficient safeguards exist to protect the rights of defendants. The Northern Ireland Affairs Committee also shares this view.¹⁸⁰ It is worth pointing out here that the absence of a jury trial itself does not automatically result in a violation of the right to a fair trial,¹⁸¹ and the ECHR does not specifically provide for this, for the reason that other jurisdictions, particularly in civil law States, do not have this tradition. In relation to the creation of a Southern-style Special Court for organised crime, the Recorder of Belfast and a defence lawyer stated that it would not be necessary as the current arrangements would be sufficient. Justice McCloskey also stated that this would be a political question for the legislature.

However, there are some immediate steps which the United Kingdom and Northern Ireland should take. The Criminal Justice (Northern Ireland) Order 1996 has created an offence of jury intimidation, similar to the offence under the Criminal Justice and Public Order Act 1994 in England and Wales, with a punishment of 5 years' imprisonment. Intimidation of witnesses attracts the same level of penalty as noted above. In addition, the 2007 Act imposes a penalty of up to 2 years' imprisonment for disclosure of jury information.¹⁸² **Given the need to tackle the culture of fear prevalent in Northern Ireland, the research team regards these punishment regimes as too lenient. By way of comparison, jury and witness intimidation in Ireland attracts 15 years' imprisonment, as noted elsewhere. This once again is an example of good practice and the United Kingdom should follow suit.**

In Ireland, jury trial is protected by article 38.5 of the Constitution, which provides that, save in certain circumstances, 'no person shall be tried on any criminal charge without a jury'. Article 38.3 of the Constitution states that special courts may be established for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. Section 35(2) of the Offences Against the State Act 1939 further permits the government to issue proclamations establishing special courts, and the current SCC came into effect in 1972. Although the Irish government justified the reintroduction of the Court in 1972 on the basis of the paramilitary threat of terrorism, the Supreme Court has upheld the use of the SCC for dealing with organised crime where it is believed that juries are prevented from doing justice.¹⁸³

¹⁷⁸ One case worth mentioning is *R v Clarke and Anor* [2010] NICC 7, concerning tiger kidnapping. In this case, McCloskey J (and subsequently upheld by the Court of Appeal), recognised the existence of jury intimidation and proceeded to try the case without jury.

¹⁷⁹ In *Re McParland* [2008] NIQB 1, the Northern Ireland High Court held that jury anonymity did not breach art 6 of the ECHR as the policy pursues a clear and proper public objective of preventing jury intimidation.

¹⁸⁰ Report on Fuel Laundering and Smuggling, 22.

¹⁸¹ *Kavanagh v Ireland*, before the UN Human Rights Committee. Communication no 89/1998, CCPR/C/71/D/819/1998 para 10.1.

¹⁸² s 10.

¹⁸³ *DPP v Quilligan* [1986] IR 495.

The SCC has jurisdiction over ‘scheduled offences’ set out in the Offences Against the State (Scheduled Offences) Order 1972, unless the DPP directs otherwise in a specific case, and over cases that are certified by the DPP that in his/her opinion the ordinary courts are inadequate to secure the administration of justice.¹⁸⁴ These range from illegal possession of firearms to offences under the Offences Against the State Acts. The scope of ‘scheduled offences’ was extended by section 8 of the Criminal Justice (Amendment) Act 2009 so that offences involving criminal organisations (eg participating in criminal organisations or committing offences for such organisations) will go to the SCC unless the DPP directs otherwise. When asked about the SCC, all the Garda officers and prosecutors interviewed stated that it is a valuable resource that has strengthened the ability to prosecute organised crime. In particular, intimidation of juries was said to have been prevented more effectively because of this Court. It is worth noting in this regard that between 2006 and 2011, over 50 convictions resulted from section 41 of the Criminal Justice Act 1999.¹⁸⁵ Some also argued that for some complex organised crime cases, a judge-only court might be desirable.

However, a number of criticisms have been raised against the SCC. During the drafting stage of the Criminal Justice (Amendment) Act 2009, a group of 133 practising lawyers published a letter¹⁸⁶ setting out objections to the abolition of jury trial. For example, the DPP already had a general power to refer offences to the SCC; therefore, there was no need for additional legislation. Defence lawyers and a human rights organisation interviewed also stated that issues like intimidation could be adequately managed by a trial judge deciding in a particular instance to waive a jury in response to a particular threat.¹⁸⁷ One defence lawyer additionally argued that the SCC might be counterproductive in practice, as it makes martyrs of convicted people and projects an image that they are treated differently from others. Finally, a lack of transparency in the procedure has been raised as a concern. Despite these criticisms, the establishment of the SCC in Ireland was upheld as constitutional.¹⁸⁸ In addition, in the recent case of *Donohoe v Ireland* (2013),¹⁸⁹ concerning opinion evidence provided by a senior Garda officer before the SCC, the European Court of Human Rights was satisfied that in the circumstances of this case where the officer’s evidence was not the sole or decisive evidence grounding the applicant’s conviction, sufficient procedural safeguards were in place for the SCC to protect the right to a fair trial. The importance of these decisions should be recognised.

In practice, it was discovered that there have not been very many cases of organised crime tried before the SCC. According to the Irish Court Service, there were 10 trials before the SCC in 2012, down from 13 in 2011.¹⁹⁰ This demonstrates that the majority of cases are tried by jury without any difficulty. A majority of the Committee to Review the Offences Against the State Acts 1939–98 nevertheless considered at the time of its report in 2002 that the threat posed by organised crime was sufficient to justify the continuation of the SCC.¹⁹¹ However, it simultaneously took a note of the decision by the United Nations Human Rights Committee which highlighted the failure of Ireland to demonstrate that the DPP’s certification for the applicant to be tried by the SCC was based upon reasonable and objective grounds.¹⁹² It eventually recommended that the distinction between scheduled and non-scheduled offences should no longer be retained on the ground that decisions of the DPP ought to be based on the merits of the individual case rather than some

¹⁸⁴ ss 36 and 46(1).

¹⁸⁵ Law Reform Commission, *Report on Jury Service* (April 2013), 93.

¹⁸⁶ *The Irish Times*, ‘Leading Lawyers Call for Bill on Gangs to Be Withdrawn’ (3 July 2009).

¹⁸⁷ See also Irish Human Rights Commission, *Observations on the Criminal Justice (Amendment) Bill 2009*, 6, and ICCL, *Combating Organised Crime and Respecting the Rule of Law: Human Rights Based Alternatives to the Criminal Justice (Amendment) Bill 2009*, 5.

¹⁸⁸ *Kavanagh v Ireland* [1996] 1 IR 348, 354.

¹⁸⁹ App no 19165/08.

¹⁹⁰ *Court Service Annual Report 2012*, 23.

¹⁹¹ Report of the *Committee to Review the Offences Against the State Act 1939–1998 and Related Matters* (2002).

¹⁹² *Kavanagh v Ireland*, Communication no 89/1998, CCPR/C/71/D/819/1998.

preconceived statutory assumption that persons charged with scheduled offences should be sent to the SCC.¹⁹³ Currently, the DPP's powers under the Offences Against the State Act 1939 and the Criminal Justice (Amendment) Act 2009 are not scrutinised judicially, and the Committee also recommended that any decision of the DPP should be subject to a positive judicial review mechanism. These recommendations were also highlighted by the Irish Human Rights Commission¹⁹⁴ and the Law Reform Commission.¹⁹⁵ The latter in particular considered that there was a strong argument in favour of a re-examination of the operations of the SCC. **In order to boost public confidence, the research team considers it desirable that cases should only be sent to the SCC after a consideration on the merits of each case whether or not the ordinary courts are adequate, and that there should be a mechanism for judicial scrutiny in respect of all cases that are sent to the SCC.**

4.2 Evidential Issues

There are several evidential issues to be highlighted. In relation to witness intimidation, some measures have been introduced in both jurisdictions. Article 20 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 makes provision for the admissibility of the previous oral and documentary statements of witnesses who do not give evidence through fear, and article 23 provides for the admissibility of prior statements inconsistent with a witness's testimony for the purpose of proving its truth. In Ireland, section 16 of the Criminal Justice Act 2006 allows for the admissibility of a statement of a witness where the witness either (a) refuses to give evidence, (b) denies making the statement, or (c) gives evidence which is materially inconsistent with it, provided that the defence can cross-examine the witness. The Deputy DPP in Ireland has confirmed that this is useful in addressing witness intimidation. This provision has to date withstood human rights and constitutional challenge. However, an important point was expressed that a more effective witness protection scheme should be implemented so that there is no need to rely on section 16,¹⁹⁶ and this view was supported by defence lawyers as well as a human rights organisation interviewed.

Another important matter is disclosure of evidence. This is essential for ensuring a fair trial for the suspects of organised crime.¹⁹⁷ The duty to disclose evidence is stipulated, *inter alia*, in the Criminal Procedure and Investigations Act 1996 (as amended) in the United Kingdom as well as the Constitution of Ireland.¹⁹⁸ One of the difficulties in relation to organised crime is that the intelligence gathered is often of a sensitive nature, and this requires the law enforcement communities in both jurisdictions to protect its sources as well as the means and methods of intelligence gathering. Consequently, the prosecutorial authorities may decide that they do not wish to disclose certain evidence. In the United Kingdom, so-called public interest immunity can be granted by the court for this purpose under the 1996 Act, and a similar arrangement exists in Ireland under 'public interest privilege'. An added safeguard is provided for non-jury trial in Northern Ireland, as a separate judge is selected to address disclosure issues. The CPS in England has issued guidance on public interest immunity to ensure that its prosecutors comply with relevant legislation and human rights.¹⁹⁹ In addition to the Code for Prosecutors, which

¹⁹³ *ibid* paras 9.57 and 9.64.

¹⁹⁴ Irish Human Rights Commission, *Observations on the Criminal Justice (Amendment) Bill 2009*, 6-7.

¹⁹⁵ Law Reform Commission, *Report on Jury Service* (April 2013), 95.

¹⁹⁶ Third Discussion Document, 37.

¹⁹⁷ *Rowe and Davis v United Kingdom*, App no 28901/95 (2000).

¹⁹⁸ Arts 38 and 40.

¹⁹⁹ CPS, '<http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/disclosure_manual_chapter_8/>' accessed 20 February 2014.

includes a section on disclosure, the PPS has also produced a comprehensive and detailed *Disclosure Manual* which provides guidance on handling highly sensitive material and public interest immunity. This is complemented by the Attorney General's Guidelines on Disclosure (2005). The DPP in Ireland has detailed guidance for this under the 'Disclosure' section of the Guidelines for Prosecutors (2010). In any event, the need for this measure has also been recognised by the UK judiciary:

Circumstances may arise in which material held by the prosecution and tending to undermine the prosecution or assist the defence cannot be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest. The public interest most regularly engaged is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and under-cover agents, or the use of scientific or operational techniques (such as surveillance) which cannot be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations. In such circumstances some derogation from the golden rule of full disclosure may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial.²⁰⁰

It is important to add here that withholding of evidence is not an automatic violation of the right to a fair trial under article 6 of the ECHR, provided, among others, that the procedure is authorised by an independent judge.²⁰¹ Both the United Kingdom and Ireland comply with this generally because of the requirement for judicial oversight. This was recently confirmed in *Twomey and Cameron v United Kingdom* and *Guthrie v United Kingdom*, both of which were jointly heard in 2013.²⁰² These cases related to non-disclosure of evidence in relation to the jury tampering provision in the Criminal Justice Act 2003 noted above, and the European Court of Human Rights concluded that the Act contained sufficient safeguards to maintain the applicants' right to a fair trial. Further, in the aforementioned case of *Donohoe v Ireland*, the European Court of Human Rights reached a similar conclusion in relation to the non-disclosure of the sources of opinion evidence.

In practice, it seems that an application for public interest immunity or privilege is common in relation to serious crimes, including organised crime. One difficulty which has been identified by the law enforcement communities and judges in both jurisdictions is the protection of witnesses during criminal investigation and proceedings. They confirmed that sometimes they must stop criminal prosecutions and proceedings in order to protect the article 2 right (the right to life) of informants and/or witnesses rather than disclosing their identities to the defence. A related point is the existence of a so-called 'innocence at stake' exception in Ireland. Under this, disclosure is regarded as necessary where the evidence in question could show the innocence of suspects.²⁰³

²⁰⁰ *R v H* [2004] UKHL 3.

²⁰¹ *Doorson v The Netherlands*, App no 20524/92 (1996), *Jasper v United Kingdom*, App no 27052/95 (2000), and *A and Others v United Kingdom*, App no 3455/05 (2009).

²⁰² App nos 67318/09 and 22226/12.

²⁰³ *Marks v Beyfus* (1890) QBD 494.

This can still put the life of informants and witnesses at risk, and under such circumstances the prosecution would generally be discontinued.²⁰⁴ These practices clearly demonstrate that prosecutors and judges in both jurisdictions carefully consider the human rights of relevant individuals involved in the criminal proceedings and balance competing interests appropriately.

Another interesting issue relating to evidence is the use of intercepts in court. At present, evidence collected from the interception of telecommunications is not admissible in court.²⁰⁵ The UK government has previously commissioned a Privy Council Review²⁰⁶ led by The Rt Hon. Sir John Chilcot with the terms of reference to advise on whether a regime to allow the use of intercepted material in court could be devised. The Chilcot report, regarded as the most authoritative on intercept evidence, raised a number of risks in allowing such evidence to be used,²⁰⁷ including exposure of sensitive materials and sources of intelligence as well as means and methods of intelligence gathering. In the end, the report concluded that the use of intercept evidence in criminal trials should be used in order to effectively combat serious and organised crime, provided it utilised a robust legal model based in statute and compatibility with the ECHR. The Privy Council also received a number of written submissions²⁰⁸ from Northern Ireland law enforcement agencies highlighting a number of additional issues. These included the use of non-jury trials which resulted in more stringent disclosure requirements and uncertainty surrounding the combined reserved/devolved nature of the jurisdiction. It was also noted that the use of intercept evidence had implications in terms of articles 6 and 8 of the ECHR, and that legal challenges might increase on this and other human rights grounds.

The prospect for using intercept evidence drew mixed responses in interviews in Northern Ireland. Some respondents from the PSNI, SOCA, and (from an operational perspective) the PPS felt that the benefits that might result from using this method (eg an increase in the number of successful prosecutions and the ability to target the senior members of organised crime groups) outweighed the risks. However, one prosecutor reflected that intercept materials are not necessarily ‘the magic bullet for dealing with organised crime.’ There are limits to how effective it is, because there is a difficulty in identifying who is speaking and what is being discussed. Criminals also use coded language to avoid getting arrested. Consequently, reliability of intercept evidence can be called into question. In the end, Justice McCloskey of the High Court stated that there is no lacuna or need to press for the use of intercept evidence in practice as the prosecution can use other reliable evidence.

In Ireland, while the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 does not specifically prohibit the use of intercept evidence in court, it is not relied upon as a matter of practice.²⁰⁹ Garda officers stated that they would prefer that this facility be used only for intelligence-gathering purposes. The reasons are similar to those raised above, including a difficulty in identifying the actual speakers, a risk of alerting criminals about the means and methods of intelligence gathering, and a possible negative impact on public confidence in law enforcement. In any event, there also does not seem to be a pressing need to rely on intercept evidence in relation to organised crime in Ireland. **One anomaly is that the use of intercept evidence obtained abroad may be admissible in both jurisdictions.**²¹⁰ While

²⁰⁴ *Guidelines for Prosecutors*, 43.

²⁰⁵ RIPA, s 17.

²⁰⁶ Privy Council, *Review of Intercept as Evidence: Report to the Prime Minister and the Home Secretary* (January 2008) ('Privy Council Review').

²⁰⁷ ch 4.

²⁰⁸ ch 9.

²⁰⁹ Privy Council Review, 33, and Justice, *Intercept Evidence: Lifting a Ban* (June 2006), 56-57.

²¹⁰ *DPP v Kinsella* (unreported) and *R v P* [2001] 2 WLR 463.

judges have discretion not to admit such evidence in practice, there does not seem to be a justification for this separate treatment. Setting aside the legality and State practice of admitting intercept evidence in other jurisdictions, the same issues highlighted above, including its reliability, the danger of exposing intelligence gathering, and the human rights dimensions, should also be relevant to the intercept evidence obtained elsewhere. An argument therefore could be made to examine this issue further in order to promote consistency and public confidence.

Finally, there are potential human rights concerns over the provision of opinion evidence in Ireland. One issue is the inability to cross-examine sufficiently when a Garda officer claims privilege in relation to his/her opinion evidence. Defence lawyers expressed some uneasiness in this regard. The position of the Irish Supreme Court and the Court of Appeal has been that article 38 of the Constitution and article 6 of the ECHR are not necessarily breached when Garda officers claim privilege for their opinion evidence, provided that it is not the sole evidence.²¹¹ This has been followed in a recent case of *DPP v Desmond Donnelly, Gerard McGarrigle and James Murphy*.²¹² The European Court of Human Rights has also adopted similar reasoning in *Al-Khawaja and Tahery v The United Kingdom* (2011).²¹³ In addressing the admission of evidence from witnesses not present in court (and therefore not cross-examinable), the European Court of Human Rights held that this would not result in a breach of the right to a fair trial, provided that such evidence is not the sole or decisive evidence.²¹⁴ One point to note is that the above Irish jurisprudence applies to 'unlawful organisations' within the meaning of the Offences Against the State Act 1939, and the Offences Against the State (Amendment) Act 1972 stipulates that opinion evidence must come from officers not below the rank of Chief Superintendent. This was to establish trust and credibility for such evidence.²¹⁵ In contrast, under the Criminal Justice Act 2006 as amended by the Criminal Justice (Amendment) Act 2009, opinion evidence in relation to the existence of 'criminal organisations' can be given by 'any' Garda officer. It is important to note here that the opinion evidence in this context is more limited than the Offences Against the State Acts as it is not admissible to prove that a particular defendant was in any way connected with criminal organisations. **However, in order to maintain credibility of such evidence and consistency in law enforcement, the 2009 Act should be amended so that opinion evidence is restricted to high-ranking Garda officers.**

4.3 Sentencing

A frequent theme running throughout the interviews was that penalties imposed in relation to organised crime offences are too lenient. For example, it appears that the sentences imposed in Northern Ireland for fiscal/excise fraud are generally lower than in England and Wales.²¹⁶ Between 2002 and 2012, there were only 4 prosecutions for fuel fraud that resulted in custodial sentences (ranging from a few months to 2.5 years) with the majority of criminals receiving suspended sentences or fines.²¹⁷ Assistant Chief Constable Drew Harris also stated that suspended sentences for fuel fraud seem to be the norm in Northern Ireland,²¹⁸ and the Parliamentary Northern Ireland Affairs Committee expressed a view that the punishment regime for this crime

²¹¹ *DPP v Kelly* [2006] 3 IR 115. See also *DPP v Binead* [2007] 1 IR374.

²¹² [2012] IECCA 78.

²¹³ App nos 26766/05 and 22228/06.

²¹⁴ See also *Donohoe v Ireland*.

²¹⁵ *DPP v Kelly*.

²¹⁶ Report on Fuel Laundering and Smuggling, 21.

²¹⁷ *ibid* 39 and 95.

²¹⁸ *ibid* 74.

did not serve as strong deterrence.²¹⁹ The same picture emerges in Ireland according to the officers of Revenue, Irish Tax and Customs. In relation to drug offences, a total of 1,331 penalties were imposed by the Dublin Circuit Court in 2012.²²⁰ Of these, only 222 involved custodial sentences.²²¹ Similarly in Northern Ireland, the available crime statistics reveal that, of 1,105 penalties for drug offences in 2009, custodial sentences were imposed in 173 cases.²²² In addition, sentencing for human trafficking also raises some concerns. In the aforementioned Matyas Pis case, the defendant received 3 years' imprisonment for trafficking offences (18 months on remand followed by 18 months on licence). It is understandable that matters such as a guilty plea, a lack of deception/coercion, and the defendant's previous good character were taken into consideration. Although the judge in the case made it clear that trafficking offences should always attract custodial sentences without exceptional circumstances, it is somewhat difficult to regard the sentence imposed as 'effective, proportionate and dissuasive'. The lighter punishments in the island of Ireland can potentially make it more vulnerable to forum shopping and concentration of criminal activities as noted above, and this would certainly go against the aim of creating a hostile environment for criminals.

A few more points on sentencing should be highlighted. Defence lawyers have stated that the courts seem to be reluctant to impose heavy custodial sentences upon offenders at the lower end of the food chain even if they have actually committed crimes. HMRC has additionally argued that large confiscation orders are sometimes viewed as mitigation against custodial sentences rather than being in addition to them, and this was also pointed out by the DPP.²²³ This goes against section 163(4) of the POCA which provides that 'the court must leave the confiscation order out of account in deciding the appropriate sentence for the defendant.'²²⁴ Finally, many law enforcement officers in both jurisdictions also recognised a difficulty in prosecuting and punishing leaders or bosses of criminal organisations. In the end, a question has been raised by the law enforcement community as to whether the serious nature of organised crime is understood by the judiciary.

In response, the Recorder of Belfast and Justice McCloskey of the High Court expressed a view that the sentences passed are appropriate as judges have to take various factors, including aggravating and mitigating circumstances, into consideration. This view is shared by Justice Butler of the High Court and the SCC in Ireland, who also pointed out that discretion is important so that judges can address the various issues on a case-by-case basis. Judge Miller of the Belfast Crown Court also made an important point that a sentence reflects the gravity of evidence. He gave an example of cigarette and fuel smuggling where sentences are sometimes lower. This means that the law enforcement community also has an important role to play by presenting high-quality evidence if it wants to see an appropriate sentence passed.

There is the possibility for the DPP in both jurisdictions to refer unduly lenient sentences to the Court of Appeal within 28 days of the original judgment.²²⁵ According to the PPS, the power of the DPP is exercised only exceptionally in a small percentage of cases. This suggests that the majority of the sentencing decisions are regarded as appropriate by prosecutors. Also, the DPP's reference generally applies to indictable offences (before the Crown Court) only, and a difficulty

²¹⁹ *ibid* 22.

²²⁰ *Court Service Annual Report 2012*, 36.

²²¹ *ibid*.

²²² Department of Justice, *Northern Ireland Conviction and Sentencing Statistics 2009*, 6.

²²³ Report on Fuel Laundering and Smuggling, 95.

²²⁴ The Sentencing Guidelines Council in England and Wales also makes this point clear in *Sentencing For Fraud: Definitive Guidelines*, 14.

²²⁵ Criminal Justice Act 1988, Pt IV, as amended by Justice (Northern Ireland) Act 2002, s 41.

arises when particular conduct is a 'hybrid' offence (ie an offence that may be tried either on indictment or summarily), although the Secretary of State may include these offences through statutory instruments.²²⁶ As one official of the Department of Justice explained:

The concern is that there have been too few custodial sentences, and the way to address that is through the process of making them referable so that you can send them to the Court of Appeal and say that in these circumstances a custodial sentence is appropriate.

It is important to recognise here that the Northern Ireland government has taken some steps to rectify this problem for some forms of organised crime. For example, fiscal/excise fraud under section 170 of the Customs and Management Act 1979 was not previously referable to the Court of Appeal. This changed with the adoption of the Criminal Justice Act 1988 (Review of Sentencing) Order (Northern Ireland) 2013 which came into force in December 2013. A similar action was taken in relation to trafficking for labour exploitation by the Criminal Justice (Northern Ireland) Act 2013. These are examples of good practice and demonstrate the commitment of Northern Ireland to make this jurisdiction a hostile environment for criminals to operate. **However, an offence of money laundering under the POCA is not currently referable, and this should be rectified, given the important implication this has for the confiscation of criminal proceeds.**

In Ireland, the DPP can also refer unduly lenient sentences to the Court of Criminal Appeal within 28 days of the original judgment.²²⁷ There is a rate of approximately 30 referrals annually (most of which are not organised crime). Similar to Northern Ireland, the Court of Criminal Appeal would not intervene unless it can be shown that there has been a substantial departure from what would be regarded as the appropriate sentence.²²⁸ Also, the DPP can only refer sentences imposed upon conviction on indictment. This means that summary conviction, which applies to offences including fiscal/excise fraud, is not referable in this jurisdiction. In 2006, the Law Reform Commission published a report entitled Consultation Paper on Prosecution Appeals from Unduly Lenient Sentences in the District Court. After carefully examining arguments for and against allowing appeals from the District Court, the Commission recommended that a procedure should be introduced into Irish law for appealing against unduly lenient sentences imposed in the District Court.²²⁹ **The research team supports this reform for organised crime, particularly in light of that fact that 95% of the respondents (1,004 in total) to the Crime Survey Opinion Poll (2010) stated that the government should take a tougher stance to combat organised crime.**²³⁰ In any event, Justice Butler of the High Court and the SCC stated that the Court of Criminal Appeal can be active in increasing sentences (up to 50%, applying to all cases). The frequency and percentage therefore are higher in this jurisdiction than in Northern Ireland.

Some of these issues can be addressed through the creation of clear sentencing guidelines on organised crime that would enhance consistency in sentencing and public confidence in the criminal justice systems. In this regard, a review of the existing guidelines (or the creation of new

²²⁶ One recent example is the Criminal Justice Act 1988 (Reviews of Sentencing) Order 2006.

²²⁷ Criminal Justice Act 1993, s 2.

²²⁸ *DPP v Byrne* (1995) 1 ILRM 279.

²²⁹ 95.

²³⁰ Red C, *Crime Survey Opinion Poll 2010*, 3.

ones where crimes were not sufficiently understood) was recommended by many of those interviewed. In England and Wales, the Sentencing Council publishes Sentencing Guidelines on various crimes to allow judges to seek consistency in sentencing and to facilitate public understanding on the issue.²³¹ Some of the relevant Guidelines include drug offences,²³² fraud,²³³ and sexual offences (which includes a part on trafficking for sexual exploitation).²³⁴ One of the main problems with these Guidelines is that they do not take into account sufficiently the sophisticated and serious nature of organised criminality. The Sexual Offences Guidelines do not clearly designate involvement of organised criminal gangs as an aggravating factor. The same is true for the Drug Offences Guidelines. **It is therefore recommended that the existing Guidelines be reviewed and amended accordingly.**

There is no body equivalent to the Sentencing Council in Northern Ireland. While the courts can rely on the abovementioned Sentencing Guidelines produced by the Council, these are secondary, and the guidelines developed by the Court of Appeal in Northern Ireland take precedence.²³⁵ It has been recognised that the Court of Appeal guidelines are a very effective way of sending a clear message to the lower court and structuring judicial sentencing. Without casting doubts on the ability of the Court of Appeal to provide effective guidance in many cases, one of the difficulties is that without comprehensive guidelines governing all cases at all levels, there is the risk that inconsistent sentences continue to be imposed by trial judges in Northern Ireland. This can be exacerbated by a degree of subjectivity reflected in sentences depending on how factors such as the 'public interest' or the 'interests of justice' are interpreted by individual judges. One defence lawyer also made an important point that there can be no guidance until an issue is taken up by the Court of Appeal, and this creates a possibility of some of the new/emerging forms of criminality not receiving immediate and appropriate attention. In addition, a lack of published guidelines prevents members of the general public from gaining better understanding of the subject matter as they do not generally possess sufficient skills in legal research and analysis. **All of these point to a conclusion that it is desirable to have clear published guidelines for organised crime in Northern Ireland.**

It is important to mention a couple of recent developments on sentencing in this jurisdiction. The Department of Justice Northern Ireland initiated a consultation on a Sentencing Guidelines Mechanism in October 2010 in response to the Hillsborough Castle Agreement.²³⁶ The need to achieve greater consistency and transparency was highlighted during consultation. The Northern Ireland Assembly also commissioned research on comparative sentencing guidelines mechanisms, which examined the role of various sentencing guidelines and bodies, and suggested a number of issues for consideration.²³⁷ Alongside this, Lord Chief Justice of Northern Ireland has set up a Programme of Action on Sentencing that has sought to introduce new guidelines for a range of offences identified in the consultation.²³⁸ Crimes such as fiscal/excise fraud, human trafficking, and slavery/forced labour were mentioned. A sub-group to draft some guidelines has been set up and is continuing its work as at the time of writing. **It is hoped that the sub-group pays sufficient attention to organised crime and provides clearer guidance in the near future.**

²³¹ Sentencing Council, <<http://sentencingcouncil.judiciary.gov.uk/>> accessed 21 February 2014.

²³² *Drug Offences: Definitive Guidelines* (2012).

²³³ *Sentencing for Fraud: Definitive Guidelines* (2009).

²³⁴ *Sexual Offences Act 2003: Definitive Guidelines* (2007). This guideline is currently being reviewed.

²³⁵ *Attorney General's Reference (Number 1 of 2008), Gibbons and Others* [2008] NICA 41 para 44.

²³⁶ Department of Justice, *Consultation on a Sentencing Guidelines Mechanism (October 2010), and Summary of Responses* (March 2011).

²³⁷ Northern Ireland Assembly, *Comparative Research into Sentencing Guidelines Mechanisms* (2011).

²³⁸ Sentencing Working Group, *Monitoring and Developing Sentencing Guidance in Northern Ireland: A Report to the Lord Chief Justice* (June 2010), and Report by the Lord Chief Justice's Sentencing Group (December 2012).

In Ireland, there is also no Sentencing Council. The appellate courts have begun to formulate general sentencing guidance and, in some instances, specific guidelines, but not in the area of organised crime. This lack of guidance may be mitigated to some extent by the fact that a serious offence committed as part of, or in furtherance of, the activities of a criminal organisation is statutorily treated as an aggravating factor.²³⁹ In this way, the chance of organised crime attracting higher sentences is greater than in Northern Ireland, and this is an example of good practice. However, clear guidelines on organised crime are still desirable, as stressed above. In 1996, the Law Reform Commission recommended the introduction of sentencing guidelines on crime generally in order to seek consistency in sentencing.²⁴⁰ In 2003, the Working Group on the Jurisdiction of the Courts, chaired by Justice Fennelly of the Supreme Court, also recognised a need to develop a system of objective guidance for sentencing judges at all levels and called for a further independent study.²⁴¹ Subsequently, the Department of Justice and Equality published a *White Paper on Crime, Discussion Document No. 2: Criminal Sanctions* in 2010 as part of a consultation process. Many submissions received were in favour of the creation of a sentencing council and guidelines for clarity and coherence.²⁴² These also noted that discretion and resultant discrepancies in sentencing could damage public confidence.²⁴³ In order to address some of these issues, the judiciary has established an online platform known as the ‘Irish Sentencing Information System’²⁴⁴ that provides information on sentencing to judges. This can also be accessed by the general public. However, concerns have been expressed about its long-term sustainability.²⁴⁵ There is also currently no guidance on organised crime listed on this website. More recently in 2013, the Law Reform Commission stated that the aforementioned Information System could be supplemented by a dedicated body to formulate sentencing guidelines.²⁴⁶ In particular, it highlighted the limitations inherent in relying upon guidance issued by the Court of Criminal Appeal, such as the insufficient volume of sentencing appeals and a case-by-case approach, potentially leading to inconsistency.²⁴⁷ When asked if there should be a body like the Sentencing Council in Ireland, Justice Butler of the Irish High Court and the SCC stated that clearer guidelines for serious offences were indeed desirable, and revealed that a similar system to the Sentencing Council is currently being developed in Ireland. This is a welcome development.

4.4 Confiscation of Criminal Proceeds

In the United Kingdom, the main law governing confiscation of criminal proceeds is the Proceeds of Crime Act 2002, which provides the authorities with the power to freeze and confiscate criminal proceeds and imposes an obligation on financial and other related institutions to disclose suspicious transactions. This is in conformity with the Council Framework Decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.²⁴⁸ There are two types of confiscation stipulated under this legislation. The first is confiscation after a person is convicted of a criminal offence and subsequently sentenced. A confiscation order can be issued by the court in a separate proceeding if it is found that the defendant has benefited from his/her criminal conduct.²⁴⁹ All in all, the Recorder of Belfast has stated that this element of the confiscation regime

²³⁹ Criminal Justice Act 2006, s 74 (as inserted by the Criminal Justice (Amendment) Act 2009).

²⁴⁰ Law Reform Commission, *Report on Sentencing* (1996).

²⁴¹ Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (2003), 172.

²⁴² *White Paper on Crime Consultation Process: Criminal Sanctions, Overview of Written Submission Received* (August 2010), 6.

²⁴³ *ibid* 11.

²⁴⁴ ISIS, *Irish Sentencing Information System* <<http://www.irishsentencing.ie/>> accessed 28 February 2014.

²⁴⁵ *White Paper on Crime Consultation Process: Criminal Sanctions, Overview of Written Submission Received*.

²⁴⁶ Law Reform Commission, *Mandatory Sentences* (2013), 35 and 40.

²⁴⁷ *ibid*.

²⁴⁸ [2005] OJ L159/223. See also *Proposal for a Directive of the European Parliament and of the Council on the Freezing and Confiscation of Proceeds of Crime in European Union*, COM (2012) 85 final.

²⁴⁹ s 2 (England and Wales), s 92 (Scotland) and s 156 (Northern Ireland). Also see CPS, *Proceeds of Crime Guidance: Confiscation and Ancillary Orders - Post POCA 2002*.

is rigorously applied in Northern Ireland. Another type of confiscation is civil recovery of proceeds generated from unlawful conduct under Part 5 of the POCA. This can be instituted against property worth more than £10,000 through civil proceedings before the High Court if it is satisfied that the alleged unlawful conduct occurred to the civil standard of the ‘balance of probabilities’.²⁵⁰ According to the NCA officers interviewed, civil recovery investigations normally involve more than one predicate offence, taking into account a number of relevant factors such as intelligence, cash seizures, and tax offences, as well as people who may be affected. The research team has also learned that over 95% of civil recovery in Northern Ireland was conducted previously by SOCA. This underscores the importance and relevance of the work carried out by SOCA (and now the NCA) in Northern Ireland.

Several important issues should be mentioned in relation to asset recovery. In the recent case of *Perry v Serious Organised Crime Agency*,²⁵¹ the UK Supreme Court held that the High Court had no jurisdiction to make property freezing orders/civil recovery orders in relation to property held outside of the United Kingdom. This has been changed to some extent by the Crime and Courts Act 2013, under which a High Court in England and Wales may issue an order against property held abroad if, among other grounds, a crime takes place wholly or partly in the United Kingdom and/or a defendant is present in this jurisdiction.²⁵² **However, this provision does not extend to Northern Ireland, thereby creating a law enforcement gap.** Further, some human rights concerns were also expressed in relation to civil recovery when there is no criminal conviction. An important case in this regard is *Serious Organised Crime Agency v Gale*.²⁵³ In this case, the appellant claimed that the application of the civil standard in determining the existence of criminal proceeds, particularly in the context of his acquittal in Portugal, was a breach of article 6(2) of the ECHR (presumption of evidence). The appeal was dismissed by the Supreme Court on the grounds that the Part 5 POCA proceedings were not a ‘direct sequel’ or ‘a consequence and the concomitant’ of any criminal proceedings, and that they were free-standing proceedings. The European Court of Human Rights also upheld the compatibility of the civil recovery regime with the ECHR in the past.²⁵⁴

More importantly in Northern Ireland, the ability to carry out civil recovery effectively has been placed in doubt, and this is one area in which devolution has had a tangible impact. The National Crime Agency (Limitation of Extension to Northern Ireland) Order 2013 permits the NCA to carry out civil recovery functions in Northern Ireland but only in relation to non-transferred offences (eg immigration and customs offences) and closely connected transferred offences. To illustrate this with an example, the NCA can investigate fuel laundering, which is a non-transferred offence. It can simultaneously investigate a transferred offence of money laundering that is connected closely to this offence. In reality, the research team discovered that the NCA does not address the latter types of offences in the current political environment. This makes Northern Ireland more vulnerable to money laundering and other criminal activities. A number of interviewees also described a potential worst-case scenario where Northern Ireland is affected by inconsistent implementation of civil recovery. The High Court in Northern Ireland can only make orders for assets held in this jurisdiction. If civil recovery concerns assets held both in Belfast and in another city in England, then an additional application must be made in that jurisdiction, leading to

²⁵⁰ s 241.

²⁵¹ [2012] 3 WLR 379.

²⁵² It is important to note, however, that this new rule is still subject to *lex situs* of the jurisdiction where assets are located.

²⁵³ [2011] UKSC 49.

²⁵⁴ *Engel and Others v The Netherlands* (1976) App nos 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, *Butler v United Kingdom* (2002) App nos 41661/98, and *Walsh v United Kingdom* (2006), App nos 43384/05.

duplication of efforts and resources. In addition, while the PPS can still perform the civil recovery function, in an earlier submission to the Northern Ireland Affairs Committee, it noted that it had no experience in using these civil recovery powers as these had been exercised by SOCA.²⁵⁵ Moreover, there are a number of other issues, including the need for more resources and training.²⁵⁶ It was also pointed out that, unlike the CPS in England and Wales, the PPS enjoys no indemnity against claims for costs in the event of a failed attempt to recover assets by these means.²⁵⁷ When asked if it was possible for the PSNI to take on civil recovery functions, Detective Chief Superintendent Roy McComb noted that time-consuming changes to legislation at a national level would be required if the PSNI were to be provided with confiscation powers under the POCA regime. In light of this problem, a workable compromise was suggested by some representatives of the Policing Board that would allow the NCA to conduct civil recovery in relation to all forms of organised crime, in addition to reserved matters such as immigration and taxation. **The research team takes the view that effective action against organised crime requires a consistent and robust mechanism to confiscate criminal proceeds, and it is desirable that the agency with sufficient experience and expertise takes on this task. Exclusion of the NCA can also undermine the multi-agency approach and inter-agency co-operation. Therefore, organised crime should be regarded as a politically neutral issue, and Northern Ireland should allow the NCA to carry out this function. The issue of accountability could be mitigated to some extent by allowing the NCA to provide regular information to the relevant bodies such as the Northern Ireland Assembly, the Department of Justice, and the OCTF. In addition, as was the case for SOCA, a provision could be made for the Police Ombudsman to hear complaints relating to the conduct of the NCA.**

In Ireland, there are two types of confiscation. The first type is ordered after conviction under the Criminal Justice Act 1994. It is worth pointing out from the outset that the Irish legislation is often used as a template for other States, including the United Kingdom, as the Irish legislation predates the other legislation. One interesting aspect of asset recovery is the procedural differences depending on the types of crimes committed. Drug trafficking entails enhanced confiscation, while for other crimes, the DPP has to prove that any benefit was generated solely as a result of a crime of which one is convicted.²⁵⁸ For example, if one is charged with multiple offences and convicted of one of them, the court can only issue an order for this convicted offence (but not others). This is different for drug trafficking where confiscation applies to all criminal activities connected to this offence. When asked whether this anomaly should be rectified, one prosecutor stated that it should be. **The research team also does not see a reasonable ground for separate treatment as this can send a wrong message to the general public as well as criminals, and recommends that Ireland considers amending the legislation so that the same rule would apply to other forms of organised crime.**

It is worth noting here the potential impact of confiscation proceedings on the right to a fair trial. In the often-cited case of *Phillips v United Kingdom* (2001)²⁵⁹ before the European Court of Human Rights, the applicant argued, *inter alia*, that section 4 of the Drug Trafficking Act 1994, relating to the assumptions made by the court that any property held by a convicted person within the preceding six years represented the criminal proceeds,²⁶⁰ breached article 6, the presumption of

²⁵⁵ Report on Fuel Laundering and Smuggling, 24.

²⁵⁶ *ibid.*

²⁵⁷ *ibid.*

²⁵⁸ ss 4–8 for drug trafficking and s 9 for other offences.

²⁵⁹ App no 41087/98.

²⁶⁰ The equivalent provisions can be found in the POCA (s 160 for Northern Ireland).

innocence in particular. The European Court of Human Rights began by holding that the purpose of the confiscation proceeding was not to determine the applicant's guilt (as he had been convicted previously), and therefore that the presumption of innocence did not apply.²⁶¹ It continued to emphasise that the assumptions stipulated under the UK legislation were not made against the applicant's guilt, and that there were sufficient procedural safeguards in place (public/open hearing, disclosure of the prosecution's case, and an opportunity to rebut such an assumption on the balance of probabilities).²⁶² In the end, the European Court of Human Rights concluded that there was no violation of article 6. Applying this reasoning to the Criminal Justice Act 1994 in Ireland, it is clear that it generally complies with this EHCR jurisprudence as it mirrors the UK legislation, including the relevant safeguards.²⁶³

The second type of confiscation is civil recovery without conviction, stipulated under the Proceeds of Crime Act 1996. Civil recovery orders may be made against property worth at least €13,000 which is deemed to constitute proceeds of crime. Interim orders, which can be made ex parte, prevent a specified person from dealing with the property for a limited period,²⁶⁴ while interlocutory orders require concrete evidence. As with the United Kingdom, the civil standard of proof applies in relation to recovery proceedings.²⁶⁵ Opinion evidence of senior police officers or officers of Revenue, Irish Tax and Customs is admissible in the application of these orders if the High Court is satisfied that there are reasonable grounds for that belief, and hearsay evidence can be admitted. Further, unlike the United Kingdom, the POCA, as amended by the Proceeds of Crime (Amendment) Act 2005, covers the proceeds and property held abroad, provided that the suspect is domiciled, resident, or present in Ireland, or that any part of the crime takes place within its jurisdiction.

When asked about the effectiveness of the POCA, officers from An Garda Síochána's Criminal Asset Bureau argued strongly that it was both fair and highly effective. Many officers recounted the unacceptable situation prior to the enactment of the Act when criminals were able to flaunt their illicit wealth through the acquisition of desirable properties, sports cars, and other forms of affluent living. It also seems that good safeguards are in place. Judicial scrutiny is provided by a specialist Judge in the High Court, and there is an option to have confiscated property returned under appeal up to seven years after it has been removed from the claimant. One High Court Judge interviewed stated that the system is generally efficient. One of the reasons for this is that relevant agencies (eg An Garda Síochána and Revenue, Irish Tax and Customs) communicate with each other regularly, ensuring consistency. However, a defence lawyer expressed some concerns over the civil recovery process including the reversal of the burden of proof to the defendant and other risks to due process brought about by the bargaining policy on which assets can be seized. It should be noted here that in *Gilligan v CAB*, the submission that the POCA violated the Constitution by interfering with the judicial function and infringing guarantees on private property rights was rejected by the Supreme Court.²⁶⁶ This suggests that the civil recovery regime is regarded as constitutional and generally compliant with human rights in Ireland, similar to the United Kingdom.

²⁶¹ para 35.

²⁶² paras 43-47.

²⁶³ s 5.

²⁶⁴ 1996 Act, s 2.

²⁶⁵ s 8(2).

²⁶⁶ [2001] IESC 82.

While it seems evident that the law enforcement communities in both jurisdictions have become more proactive in tracing and confiscating criminal proceeds compared to the past, given the sophisticated nature of criminal operations noted above, challenges still remain. A question remains whether the relevant authorities have been able to confiscate the majority of the criminal proceeds in both jurisdictions. Between 2012 and 2013, Northern Ireland seized £1.359 million of criminal assets,²⁶⁷ while the confiscated amount in the previous year was £4.422 million.²⁶⁸ In Ireland, criminal assets worth €2.764 million were seized in 2012.²⁶⁹ While this figure represents an increase compared to 2011 (€2.010 million),²⁷⁰ the amount was higher in 2010 (€3.051 million).²⁷¹ While a number of factors need to be taken into consideration in analysing these figures, it is also the fact that money laundering has become much more elaborate and transnational in recent times, and a large amount of criminal proceeds are not traced in reality. Some frustrations were expressed by interviewees in this regard. This necessitates closer co-operation with financial institutions so that they can report suspicious transactions. In addition, the punishment regime for money laundering needs to be strengthened, as emphasised above.

The Criminal Assets Bureau (CAB) also mentioned difficulties in exchanging information or evidence through mutual legal assistance. The CAB operates under the civil offence standard, whereas the mutual legal assistance transfer mechanism is for criminal prosecutions. Therefore, the CAB can send out a mutual legal assistance request for evidence, but the information it gains cannot be used in the civil environment as it does not have the same effect in court. One officer reported that this problem can be circumvented by asking other countries for their permission to use the evidence in the civil realm, or by asking them to provide an expert witness. However, some States have actually refused such permission, because they do not recognise non-conviction-based confiscations. In comparison, it has become a common practice for officers from HMRC and the PSNI in Northern Ireland to give evidence in civil recovery cases.

An important facility to alleviate this problem to some extent is the Camden Asset Recovery Inter-Agency Network (CARIN Group), which consists of an informal network of asset recovery offices and agents. The name comes from the Camden Court Hotel in Dublin where the first meeting was held in 2003. It originally involved 5 European States with asset recovery legislation for the purpose of comparing good practice. There are now 53 States, and Dublin recently hosted the 2013 annual conference with over 130 delegates attending. This has facilitated better co-ordination and dialogue among Member States to strengthen their asset recovery capability, and should be regarded as an example of good practice.

In summary, it seems evident that there is scope for improvement in relation to criminal proceedings and confiscation of criminal proceeds.

²⁶⁷ OCTF Annual Report 2013, 20.

²⁶⁸ OCTF Annual Report 2012, 19.

²⁶⁹ Office of the DPP, *Annual Report 2012*, 60.

²⁷⁰ Office of the DPP, *Annual Report 2011*, 58.

²⁷¹ Office of the DPP, *Annual Report 2010*, 66.

Section 5: Prevention of Organised Crime

The prevention of organised crime has become an important consideration in Northern Ireland and Ireland, with both jurisdictions describing a variety of actions that are intended to raise public awareness, reduce demand for illicit goods and services, and restrict the opportunities for organised criminals to profit from their enterprises. In Northern Ireland, the OCTF uses threat assessments of organised crime activities to identify the areas of vulnerability and works with stakeholders to reduce the risks that are posed to their homes and businesses. A representative from the OCTF described one initiative in particular where the OCTF introduced a range of measures in response to a spate of cash-in-transit robberies. These included setting up a control room to co-ordinate the movement of cash, encouraging courier companies to incorporate a range of security features such as smoke and dye boxes and GPS trackers, and building awareness of the key weaknesses in cash-in-transit operations. As a result, the number of cash-in-transit robberies was said to have fallen from 121 incidents in 2001 to just 25 incidents in 2012.²⁷²

The NIOCS has also placed emphasis on the reduction of harm through more proactive research, awareness raising, and prevention. Significant progress has been made, for example, in the area of human trafficking. The Northern Ireland government developed a multimedia educational resource pack which has been made available to all post-primary schools²⁷³ in line with the Annual Action Plan on Human Trafficking.²⁷⁴ Another example of good practice is the 'Changing the Mindset Campaign,' which has been launched in order to deepen the general public's understanding of how their actions result in undesirable consequences such as the growth of related crimes and financing of terrorism.²⁷⁵ As part of this initiative, the OCTF and PSNI released a short video entitled 'Organised Crime, It's Closer Than You Think'.²⁷⁶ This clip highlights key areas where ordinary people may be affected by organised crime, particularly through the purchase of illicit goods and services. It was made available via YouTube and social networking sites, allowing the OCTF to engage with politicians, civil society groups, and the general public.

However, it is important to analyse the effectiveness of such initiatives. A similar exercise was done in relation to human trafficking through the 'Blue Blindfold Campaign' in 2011. Information about human trafficking was communicated through media, the internet, and other outlets such as billboards and advertising space in Northern Ireland. At the end of this campaign, the OCTF claimed that approximately 35% of adults (ie 500,000 people) saw it.²⁷⁷ Whether this can be seen as a success is open to question as the campaign itself was regarded as largely ineffective by relevant stakeholders, both governmental and non-governmental. In January 2013, the Minister of Justice launched a Crimestoppers campaign to highlight the issues of human trafficking and exploitation, which included the dissemination of a YouTube clip entitled 'Read the Signs'.²⁷⁸

²⁷² OCTF Annual Report 2012, 8.

²⁷³ In addition, the government recently launched the information booklet *Human Trafficking Know Your Rights: A Leaflet for Adult Victims of Human Trafficking*.

²⁷⁴ See, for example, *Northern Ireland Human Trafficking Action Plan 2013-2014*.

²⁷⁵ *Changing the Mindset, Organised Crime Awareness Raising and Engagement Strategy*, 1-2, (November 2013).

²⁷⁶ <http://www.youtube.com/watch?v=u8Ap6D53RB8&list=PLdQTnZqJDSokK_005wovC54KKXJQGuhZtH> accessed 14 January 2014.

²⁷⁷ OCTF Annual Report 2011.

²⁷⁸ <https://www.youtube.com/watch?v=bR78_D3dR5E> 14 January 2014.

According to the Department of Justice, the clip attracted over 62,100 hits within 3 months of its launch across the UK, including 15,395 views in Northern Ireland. While this may indicate that the general public is more aware of human trafficking compared to the past, the total number of viewings as of January 2014 was just over 63,500, not a significant increase after the initial three-month period.

In terms of the aforementioned video 'Organised Crime: It's Closer than You Think', it has received less than 600 hits on YouTube as of January 2014, and this suggests that the campaign's potential has not been realised as yet. When asked about this, a representative of the Department of Justice reflected that although it would be highly desirable to conduct a large television campaign or similar initiative to raise public awareness of organised crime, the resources that are needed for such a campaign were not available at that time. **It is important to reiterate here that effective confiscation and use of criminal proceeds can alleviate this problem.** The video itself was created thanks to aforementioned ARIS, but there is scope to utilise this resource further so that the general public is better educated.

Another issue to be pointed out is the value of annual reports and threat assessments published by the governments. One of the important functions of these publications is to provide information via the internet and other means to the general public so that they are better educated on issues relating to organised crime. However, the extent to which they fulfil this function is not clear. These publications are rarely advertised through the local media, and it is premature to assume that the members of the general public actively access them. It should be highlighted here that only 33% of the respondents to the recent survey on organised crime knew what the OCTF was.²⁷⁹ In addition, it is a fact that people continue to purchase illicit goods and services in Northern Ireland. The drug prevalence survey conducted in the island of Ireland revealed that life-time use of cannabis in Northern Ireland has steadily increased.²⁸⁰ A recent report published by PricewaterhouseCoopers also suggests that people in Northern Ireland buy more counterfeit goods than other regions of the United Kingdom.²⁸¹ Crucially, only about a half of the respondents stated in the aforementioned organised crime survey that their role in tackling organised crime included refusing to purchase illicit goods and services.²⁸² This shows a lack of sufficient understanding of organised crime and casts some doubts on the value of these publications in educating the general public. The PSNI and the Policing Board also raised some concerns in this regard.

While it is important to recognise some progress in areas such as human trafficking, the law enforcement community could do more to reach out to the local/national media outlets as well as civil society groups (human rights NGOs, youth groups, church organisations, etc) to acquire their co-operation for wider dissemination of relevant information. They should also target local communities experiencing social exclusion and poverty where there is an increased risk of people getting involved in criminal activities. In addition, given the strong nexus between organised crime and terrorism, a clear message that the purchase of illicit goods and services fuels terrorism should be effectively communicated to the public. The continuation of community outreach/policing is therefore essential. It is

²⁷⁹ Omnibus Survey, 14. 7% and 3% of the respondents said they became aware of the OCTF through government publications and their websites respectively.

²⁸⁰ From 16.8% (2002-2003) to 24% (2010-2011). A similar picture emerges in Ireland as well. Cross-Border Organised Crime Assessment 2012, 9. See also Department of Health, Social Services, and Public Safety (DHSSPS), *A Framework for Reducing Alcohol and Drug Related Harm in Northern Ireland 2011-2016*, 11-20 for a detailed discussion of the impact of illegal drugs in Northern Ireland.

²⁸¹ PricewaterhouseCoopers, *Counterfeit Goods in the UK: Who is Buying What and Why?* (October 2013), 5.

²⁸² Omnibus Survey, 7-9.

important here to acknowledge that prevention should not be the job of the law enforcement bodies alone. All relevant Departments in Northern Ireland, including Departments of Education, Health and Social Development, must work together to devise a coherent and effective prevention strategy. An example of good practice is the overall strategy for alcohol and drugs, which was developed by the Department of Health, Social Services and Public Safety in partnership with other agencies such as the Department of Justice and the PSNI.²⁸³ More of these can be facilitated by proactive participation of these and possible other bodies in the OCTF informally or formally. Further, the Northern Ireland Assembly should treat organised crime as a politically neutral issue, facilitate cross-party consensus, and render its support to the law enforcement community as well as the civil society sector.

In Ireland, An Garda Síochána deploys a range of measures designed to prevent organised crime by engaging with communities and stakeholders. Officers from the Garda National Drugs Unit actively contribute to the National Drugs Strategy, which sets indicators and benchmarks around the five pillars of reduction, prevention, research, rehabilitation, and treatment.²⁸⁴ The Unit, together with other agencies such as Revenue, Irish Tax and Customs and the Department of Education, visits schools to educate children and young adults about the dangers of drugs. The Garda Bureau of Fraud Investigation also provides a wide range of fraud prevention advice on its website covering areas such as ATM fraud, identity theft, counterfeit currency, and unsolicited emails.²⁸⁵ In addition, the National Action Plan to Prevent and Combat Trafficking of Human Beings in Ireland 2009-2012 set out a range of activities designed to prevent human trafficking, including raising awareness and reducing demand through public campaigns and education. It is worth mentioning in this regard that the Garda Anti-Trafficking Unit in 2012 conducted awareness training for over 4,000 probation officers, 192 ethnic liaison officers, 124 immigration officers, 42 Garda reserves, 80 Garda senior investigative officers, and 500 community stakeholders. Ireland also initiated the Blue Blindfold Campaign to reach out to the general public. When asked about the success of all this and other measures, an official from the Department of Justice and Equality argued that good progress had been made considering the resources that are available.

At the community level, a representative from the Department of Justice and Equality stated that the Irish government supports An Garda Síochána to work closely with communities, particularly by targeting young people at risk of engaging in crime and gang activities. For example, a partnership between An Garda Síochána, the Irish Youth Justice Service, and the Department of Justice and Equality resulted in the creation of 100 Garda Youth Diversion Projects. These projects have facilitated personal development and civic responsibility, and provided opportunities to improve vocational skills. The original intention of government was to expand this programme by another 68 projects, but that expansion was abandoned in 2011 due to the economic downturn.²⁸⁶ In relation to human trafficking, the Garda officers in Donegal in the past conducted regular training for the employees of the Health Service Executive (eg doctors, consultants, and nurses). When asked about the effectiveness of these interventions, several Garda officers noted that An Garda Síochána could be more proactive in this area, and that this was their aim going forward.

²⁸³ *New Strategic Direction for Alcohol and Drugs: Phase 2 (2011-2016)*.

²⁸⁴ *Ireland National Drugs Strategy 2009-2016*, 6.

²⁸⁵ See also, Irish Banking Federation and An Garda Síochána, *A Guide to Fraud Prevention* (2009).

²⁸⁶ *Progress Report on Garda Youth Project Development 2009-2011*.

Overall the impact of prevention in Ireland seems to be similar to Northern Ireland given that the general public continues to purchase and consume illicit goods and services. Between January and October 2013, for example, 929 litres of counterfeit alcohol were confiscated by Revenue, Irish Tax and Customs, four times more than the previous year.²⁸⁷ As noted above, the number of illegal or counterfeit cigarettes being consumed has also increased in recent times. Therefore, the same recommendations on prevention noted above are also proposed for Ireland.

²⁸⁷ *The Irish Times*, 'Bootleg Alcohol Seizures Rise Dramatically' (28 December 2013).

Section 6: Measuring the Effectiveness of Responses to Organised Crime

Setting appropriate benchmarks and performance indicators is important in measuring the effectiveness of responses to organised crime. The current benchmarks tend to focus on key criminal justice outcomes such as the number of organised crime gangs dismantled and convicted, or the amount of drugs, cash, or illicit property that has been confiscated. These are reflected in the Annual Policing Plan prepared by the PSNI and agreed by the Policing Board.²⁸⁸ The Policing Plan also requires the PSNI to demonstrate its progress in tackling organised crime by reporting on actions taken to reduce the harm caused by human exploitation and drugs, as well as charting the amount recovered from confiscation of criminal finances.²⁸⁹ This practice is quite similar in Ireland as An Garda Síochána regularly releases figures charting the success it has had in targeting organised crime groups and seizing illicit goods and criminal proceeds.²⁹⁰

While these statistics are helpful in highlighting the nature and extent of organised crime, they do not necessarily provide accurate benchmarks to measure the effectiveness of law enforcement. For example, increased confiscation of drugs in a given year may simply mean that more drugs were available compared to the previous year(s), and does not always indicate that the response of the law enforcement communities has been effective. On the contrary, the clandestine nature of the illegal markets and criminal activities generally means that these statistics are just the tip of the iceberg.

Some of those interviewed also voiced doubt as to whether the current methods of measuring performance are appropriate. Detective Chief Superintendent Roy McComb noted that setting targets based on the number of organised crime gangs would not always produce an accurate assessment of the proliferation of organised crime:

The first OCTF Threat Assessment identified 78 organised groups operating in Northern Ireland, and as of two days ago (September 2013) there are 142. Is that because we are simply not winning the battle? Or is it just that we now have a richer knowledge of organised crime in this jurisdiction, and we were simply underestimating the threat 12 years ago?

He added that the PSNI had tried to move away from providing a number against which its performance is assessed, as it is difficult to assign meaning to the figures when organised crime

²⁸⁸ Northern Ireland Policing Board, *Policing Plan 2012-2015: Update for 2013/14*.

²⁸⁹ *ibid.*

²⁹⁰ An Garda Síochána Annual Report 2012, 3.

groups often reform or reinvent their structures after every police operation. Some representatives of the Policing Board also agree that it is difficult to decipher what these figures mean without first understanding the context from which they are collected. They also recognise that the PSNI cannot always provide accurate figures due to the need to protect sources of intelligence.

Their colleagues in Ireland also share similar views. An officer from the National Drugs Unit noted that year-to-year figures for the seizures of drugs and money have little value as these totals will only form a small proportion of the actual drugs commodity that is out on the streets. This problem was also expressed in the context of civil recovery of assets. Some CAB officers stated that success is often measured against disrupting the activity of organised groups. In Ireland, this often means that organised criminals have been forced to move outside the jurisdiction. In reality, this is only displacing the problem as criminals will continue to control Irish crime networks from outside the country. In any event, all of these point to a conclusion that threat assessments and statistics do not always serve as an effective tool for measuring law enforcement performance and devising appropriate strategies to combat organised crime.

Instead of focusing too much on law enforcement statistics, many of those interviewed suggested that they ought to consider broader social contexts which fuel the demand for illicit goods and services. As stressed above, this requires involvement of other relevant stakeholders so that they can consider a diverse range of benchmarks which may include, but which are not limited to, poverty/economic hardship, social/cultural exclusion, education on organised crime provided to children and young adults, and rehabilitation and reintegration of offenders. Human rights compliance should also be incorporated as this will help boost public confidence in law enforcement. All of these mean that organised crime should not simply be regarded as a criminal justice issue. It is important to acknowledge that it has social, economic, and cultural dimensions, and these should be factored into the overall benchmarks. In so doing, it is essential that both governments are able to measure the impact and effectiveness of these benchmarks to allow reflection and improvement where appropriate. **The research team believes that a truly multi-agency/intergovernmental approach, which also reflects the voices of the non-governmental sector and the general public sufficiently, is the key to the successful implementation of effective action against organised crime, and recommends that both Northern Ireland and Ireland continue their efforts and good practice in this regard.**

Conclusion

This project has examined the extent to which Northern Ireland and Ireland have been implementing effective action against organised crime. It is clear that both jurisdictions have been making good progress in tackling organised crime. Intelligence-led law enforcement is actively facilitated with the use of special investigative techniques in both jurisdictions, and the relevant agencies generally regard the existing legislative and policy frameworks to be adequate in this regard, including their ability to address the nexus between organised crime and terrorism. National laws and policies on organised crime are also largely in compliance with the relevant international and European standards, although there is scope for improvement in certain areas such as legal certainty, sentencing, and judicial oversight. Another important aspect is a multi-agency approach. It was discovered that the OCTF in Northern Ireland provides a useful forum for concerned agencies to meet and discuss issues of mutual interest and to facilitate closer co-operation. While the law enforcement agencies in Ireland work well with each other, they might benefit from a similar arrangement. In relation to cross-border co-operation between two jurisdictions, the current state of affairs is generally positive. In addition to formal arrangements such as ILORs and EAWs, an informal approach is regularly facilitated by frontline officers and prosecutors. This cannot be done without a sufficient level of mutual respect and trust. In summary, there are numerous examples of good practice in law enforcement, and these should be clearly and widely acknowledged by the political community as well as the general public.

However, there are a number of issues which require further consideration and improvement simultaneously. To begin with, both jurisdictions should do more to address the supply and demand dynamics. The general public continues to purchase illicit goods and services, and this suggests that the current preventive strategies are not as effective. Another major issue is a lack of adequate resources on the part of law enforcement agencies. It is essential that law enforcement agencies are well trained and resourced so that they can take appropriate action. There is also scope for improvement in relation to sentencing and confiscation of criminal proceeds so as to maximise the deterrent effect and make the island of Ireland a hostile environment for criminals to operate. Moreover, human rights consideration and protection should be strengthened with regular training of frontline officers and more rigorous judicial oversight in some areas such as the use of special investigative techniques and the DPP's decisions on the use of non-jury trials in both jurisdictions. Finally, in order to facilitate a truly multi-agency response, all relevant government Departments should work together more closely, taking into account the voices of the civil society sector and the general public.



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